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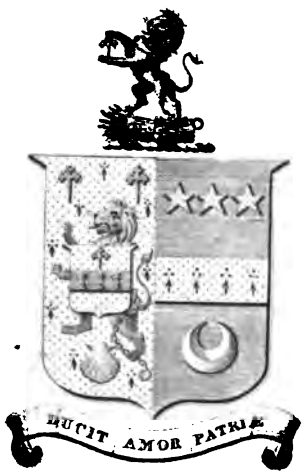

John Phillips Esq.
Ob. 1832.

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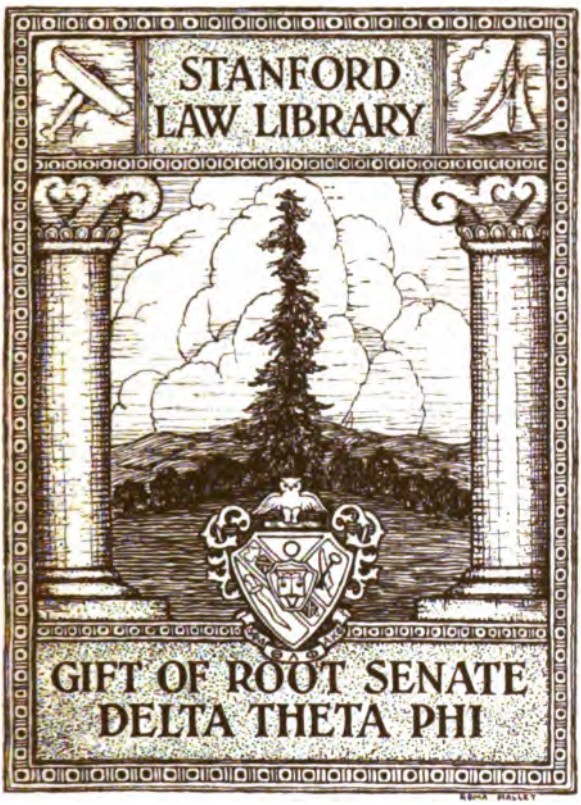

A

SYSTEM OF THE LAW

OF

MARINE INSURANCES.

WITH THREE CHAPTERS

ON BOTTOMRY;

ON INSURANCES ON LIVES;

AND

ON INSURANCES AGAINST FIRE.

By JAMES ALLAN PARK, Esq.

OF LINCOLN'S INN.

Lex (de quâ agimus) *est fons æquitatis.* CICERO.

THE FOURTH EDITION, WITH CONSIDERABLE ADDITIONS.

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1800.

and which demand from me every publick and private teſtimony of unfeigned reſpect and gratitude.

It was my wiſh to have given a ſketch of the judicial life and character of Lord *Mansfield*, by way of preface to this edition of a book, the contents of which might be conſidered as ſo peculiarly his own; and I was the more anxious to have done ſo, becauſe no other perſon had undertaken to pay this ſort of tribute to his memory, and becauſe the idea was approved of by you. But when I came to reflect upon the ſubject, when I conſidered his extraordinary talents, his great penetration, his perſuaſive eloquence, and the greatneſs of his whole character, I found my powers very unequal to ſuch an undertaking. However great my veneration and affection for his memory, and however gratifying ſuch a Work might have been to my own feelings, I ſhrunk from attempting the portraiture of a man, who, for above thirty years, had ſo eminently diſtinguiſhed himſelf in the adminiſtration of juſtice, as to excite the general admiration of *Europe*; who fixed the principles of Commercial Juriſprudence on the immutable baſis of reaſon and natural juſtice; and who, as

it was once well expreſſed by you, Sir, explained and commented upon thoſe principles, till his hearers were loſt in admiration at the ſtrength and extent of the human underſtanding.

A conſciouſneſs of my own inability, therefore, is the only cauſe for my declining a work, which I ſhould have thought my honour and my happineſs to have accompliſhed. But when hereafter it ſhall be undertaken by ſome faithful hand adequate to the execution of it, Lord *Mansfield* will then appear to poſterity to have been, what you well knew him to be, one of the wiſeſt and beſt men of the age in which he lived.

I have the honour to be, with ſincere reſpect and gratitude,

SIR,

Your much obliged

and faithful humble ſervant,

J. A. PARK.

CAREY-STREET,
May 27, 1796.

ADVERTISEMENT

TO THIS

FOURTH EDITION.

A New Edition of this Work being called for, it was my duty to render it as valuable as poſſible, by inſerting the various important caſes, which have been decided both in the Court of King's Bench, and Court of Common Pleas, ſince the former impreſſion was publiſhed. I have, however, preſerved the pages of the ſecond and third edition; and when new matter has occurred at the bottom of a page, I have continued the old page with the addition of a letter, thus 240*a*. 240*b*.—If the new matter happen to be inſerted in the middle of a page, I have been obliged to continue the old page beyond the uſual length: but this I hope will be attended with no inconvenience, as the page is always numbered at the top, and the caſes may eaſily be found, the names being viſible in the margin, even though the ſame page be in one or two inſtances neceſſarily protracted.

PREFACE

TO

THE FIRST EDITION.

WHEN a man preſumes to ſolicit publick notice for any work of a literary nature, the world have a right to know the motives, that induced him to write, and upon what foundation he builds his claim to their attention. Notwithſtanding the number of caſes, which have of late years been determined in the *Engliſh* courts of juſtice upon the law of inſurance, and the uniformity of principle, which pervades them all; yet the doctrine of inſurances is not fully known and underſtood. This in ſome meaſure happens from the deciſions upon the ſubject being ſcattered in the various books of reports, according to the order of time in which they were determined; and the connexion of which, from the nature of thoſe publications, cannot be preſerved. As many perſons cannot ſpare time, and few will take the trouble, to collect the caſes into one point of view; and as all caſes of inſurance muſt neceſſarily be attended with a number of facts, it is not to be wondered at, if from a curſory, inattentive, and unconnected peruſal of them in a chronological order, a great part of the world ſhould remain unacquainted with the true principles of inſurance law. No book that I have met with in the *Engliſh* language, has ever yet attempted to form this branch of juriſprudence into a ſyſtematick arrangement, or to reduce the caſes to any fixed or ſettled principles.

Convinced

Convinced of the utility of ſuch a work, I thought I could not employ my time more advantageouſly to my profeſſion or myſelf; nor better expreſs that reſpect which I, in common with every lawyer, feel for the venerable magiſtrate (*a*), to whom this work is inſcribed, and for the other learned judges, who have aſſiſted in erecting this fabrick, than by extracting all the caſes upon this ſubject from the maſs of other learning, with which they lie buried in the reporters; and thereby endeavouring to prove to the world that the doctrine of inſurance now forms a ſyſtem as complete in every reſpect as any other branch of the *Engliſh* law. Could any other incitement have been requiſite, the opinion of Mr. Juſtice *Blackſtone* would have had conſiderable weight. "The learning re-"lating to marine inſurances," ſays that elegant commentator (*b*), "has of late years been greatly im-"proved by a ſeries of judicial deciſions, which have "now eſtabliſhed the law in ſuch a variety of caſes, "that (if well and judiciouſly collected) they would "form a very complete title in a code of commercial "juriſprudence." Urged by theſe motives, I was induced to undertake this work, which is now preſented to the world.

No ſubject can be properly underſtood, unleſs the materials be methodically arranged; and therefore the firſt object I had in view was to fix upon certain heads, which would be ſufficient to comprehend all the law upon inſurances. For this part of the work I alone am accountable, the deſign being entirely my

(*a*) The late *William* Earl *Mansfield*, to whom the firſt and ſecond editions of this work were dedicated.

(*b*) 2 *Blackſt. Com.* 490.

own.

own. It may however, in ſome degree abate the ſeverity of cenſure to recollect, that in the arrangement of the ſubject I had no example to follow, no guide to direct me; and I was left entirely to the impulſe of my own judgment. But to enable the profeſſion to judge of the nature of my plan, I will ſtate the reaſons that influenced me in the mode I have adopted.

As the policy is the foundation, upon which the whole contract depends, I have begun with that, and endeavoured to ſhew its nature and its various kinds; and I have alſo pointed out the requiſites which a policy muſt contain, their reaſon and origin, as they are to be collected from decided caſes, or the uſage of merchants. When we have aſcertained the nature of a policy, the next object is to diſcover by what general rules courts of juſtice have guided themſelves in their conſtruction of this ſpecies of contract. It is then neceſſary to deſcend to a more particular view of the ſubject, and to fix with accuracy and preciſion thoſe accidents, which ſhall be deemed loſſes within certain words uſed in the policy. Thus loſſes by perils of the ſea, by capture, by detention, and by barratry, will be a material ground of conſideration. When a loſs happens, it muſt either be a partial, or a total loſs; and hence it becomes neceſſary to aſcertain in what inſtances a loſs ſhall only be deemed partial, in what caſes it ſhall be conſidered as total; and how the amount of a partial loſs is to be ſettled: hence alſo ariſes the doctrine of average, ſalvage, and abandonment. Theſe points therefore will be the next object of attention.

Having conſidered the various inſtances in which the underwriter will be liable upon his policy, either for

for a part, or for the whole amount, of his ſubſcription; we ſeem to be naturally led to the conſideration of thoſe caſes in which the underwriter is releaſed from his reſponſibility. This may happen in ſeveral ways: For ſometimes the policy is void from the beginning, on account of fraud; of the ſhip not being ſeaworthy; or of the voyage inſured being prohibited. There are alſo caſes, in which the inſurer is diſcharged, becauſe the inſured has failed in the performance of thoſe conditions, which he had undertaken to fulfil; ſuch as the non-compliance with warranties; and deviating from the voyage inſured: Theſe and many other points of the ſame nature occupy ſeveral chapters.

When the underwriter has never run any riſk, it would be unconſcionable that he ſhould retain the premium: Therefore after conſidering thoſe inſtances, in which this is the caſe, it is natural next to aſcertain in what caſes the underwriter ſhould retain, and in what caſes he ſhould return the premium.

It would be in vain to tell a man, that he was entitled to the aſſiſtance of the law, and that his caſe was equitable and right, without pointing out in what *forum*, and by what mode of proceeding he ſhould ſeek a remedy. I have endeavoured to point out the proper tribunal, to which a perſon injured is to apply; the mode of proceeding, which he is to adopt; and the nature of the evidence he muſt adduce to ſubſtantiate his claim, with reſpect to this contract: After the diſcuſſion of marine inſurances, I have added three chapters upon ſubjects, which, though they do not form a part of the plan, are ſo materially connected with it in the rules and principles of deciſion, that it ſeemed to me the work would be deficient without them;

them: Theſe are, bottomry and reſpondentia, inſurances upon lives; and inſurances againſt fire.

When I planned this work, I intended to prefix an introduction, containing a ſhort, hiſtorical account of the riſe and progreſs of inſurances in this country only. But upon the ſuggeſtion of one, to whoſe opinion I bow with deference, and whoſe judgment will always command obedience; I was induced to enlarge my deſign. The reader will now find a ſhort account of ſuch of the antient maritime ſtates, as have promulgated any ſyſtem of naval juriſprudence; and alſo, of the progreſs of marine law among the various ſtates of *Europe*. I have endeavoured to trace the origin of inſurance to its ſource; to point out thoſe countries in which it has flouriſhed, and the progreſs and improvement of it in our own. Such is the arrangement, which I have adopted, and on the propriety of which, the world and the profeſſion are to decide.

As to the mode of treating the ſubject, it will be proper to obſerve that, at the head of each chapter, I have ſtated the principles, upon which the caſes on that point depend; and then have quoted the caſes themſelves to ſhew, that they are agreeable and conſonant to the principles advanced. If there are any caſes, which ſeem to differ from the others, I endeavour to prove, either that they depend upon different principles, or that there are circumſtances in them, which make them exceptions to the general rules. In quoting caſes, I have been careful minutely to ſtate all the circumſtances, and alſo the opinion of the court without any alteration, or comments of my own; convinced that the utility of a work of this kind conſiſts in the true and accurate account of what the

the law is, not in idle ſpeculations of a private man, as to what the law ought to be. Beſides, one main purpoſe of ſuch a compoſition is, to ſave the profeſſors of the law the trouble of turning over vaſt volumes of reports, by collecting into one book, all the caſes upon a particular ſubject.

But unleſs the caſes are fully and faithfully reported, recourſe muſt ſtill be had to the original reporters, and the end of ſuch a compilation is defeated. At the ſame time it ought to be obſerved, that ſometimes, though not very often, ſeveral different points ariſe in one cauſe; and then, in order to preſerve the ſyſtem complete, it is neceſſary to ſeparate them, and to aſſign to each its proper place. But ſtill the opinion of the court is given fully on each of the points; and a reference is made from one part of the caſe to the other.

I had it in contemplation to have had a diſtinct chapter for the conſideration of the law relative to this ſpecies of contract in other countries of *Europe*. But upon reflecting that inſurances are founded upon the great principles of natural juſtice, rather than upon any municipal regulations; and that conſequently the law muſt be nearly the ſame in all countries, I relinquiſhed the idea. Beſides, I have throughout the work, which ſeemed to be a better plan, taken notice in what reſpects the poſitive inſtitutions of other maritime ſtates agree or diſagree with thoſe of our own: A plan, which ſerves to illuſtrate and confirm the *Engliſh* ſyſtem.

It remains to ſpeak of the materials I have uſed. Conſcious that the value of a law book depends upon the purity and excellence of the ſources, from which its

its contents are taken, I have never advanced any poſition, without referring to the book in which it was found; unleſs it be upon ſome unſettled point, where I have ſtated the arguments that may be adduced on both ſides, and left it to the reader to form his own concluſions. In my reſearches upon this occaſion, I have conſulted every foreign author that I could poſſibly obtain; and have made as much uſe of their labours, as the nature of the plan would admit.

With reſpect to the deciſions of the *Engliſh* courts of juſtice, I believe I have not omitted a ſingle caſe, that ever has appeared in print upon the ſubject: Beſides which, this collection contains a great number of manuſcript caſes, of which ſome have been determined at *Niſi Prius* only, and many have been the ſubject of deliberation in court upon caſes reſerved, or upon motions for new trials. For the latter, I myſelf am chiefly reſponſible, and upon ſome future occaſion, I ſhall be happy to correct any errors, which they may contain; as moſt of them were taken while I was a ſtudent, merely for my private uſe, without any view to future publication. I have, however, by comparing them with ſuch notes as I could obtain, done every thing in my power to render them worthy of the attention of the profeſſion. As to the *Niſi Prius* notes, I am indebted for them to the very liberal and generous communications of my young profeſſional friends; and to ſome alſo of thoſe, who are in the firſt rank at the bar. Indeed, to name any one would be an injuſtice to the reſt; and therefore, I muſt beg they will accept my general acknowledgments. I ſhould, however, be undeſerving of that attention and aſſiſtance with which I have been honoured, were I to omit this opportunity of returning my ſincere

and grateful thanks to Mr. *Juſtice Buller*, whoſe abilities are only equalled by his eaſineſs of acceſs, his ready and liberal communication of that knowledge, which is the natural reſult of ſuch talents, and ſuch unwearied application to ſtudy. The many valuable hints I have received from that learned judge, will no doubt contribute much to the utility of this work.

To thoſe who are much engaged in the labours of the profeſſion, a full and complete table of the principal matters is of the utmoſt conſequence. I have uſed my endeavours to render this part of the work as uſeful as poſſible, by ſtating each point under all the heads, that will naturally be reſorted to for the ſolution of any doubt.

Having thus explained the nature of my arrangement, the mode which I have adopted in the diſcuſſion of each chapter, and the ſources from which my information is derived, I preſent this volume to the public. The utility and neceſſity of ſuch a work are univerſally acknowledged; the attempt is therefore deſerving of ſome praiſe, and for the defects in the execution, I throw myſelf upon the candour of my profeſſion. The ſubject was noble, and required greater talents than mine to treat it as it deſerved; but if I ſhall have at all done juſtice to the great abilities of thoſe diſtinguiſhed characters, whoſe names appear in every page, I ſhall in ſome meaſure have attained the object of my wiſhes, and ſhall have the pleaſure of reflecting, that the time I ſpent in the compoſition of this work, has been at leaſt productive of much perſonal ſatisfaction and improvement.

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ERRATA.

In margin of p. 336, for *conſolidating*, read *conſolidation*.
In margin of p. 349 *a*, for 299 *b*, read 349 *b*.

INTRODUCTION.

WHEN we conſider the wonderful effects which commerce has produced on the manners of men, when we obſerve that it tends to wear off thoſe prejudices which give birth to diſſenſions and animoſities, that it unites mankind by the ſtrongeſt of all ties, the deſire of ſupplying mutual wants; and that it diſpoſes them to peace and concord, by eſtabliſhing in every community an order of men, whoſe intereſt it is to preſerve public tranquillity; we are led to think that the hiſtory and progreſs of it would not only be amuſing, but highly important and inſtructive to the inhabitants of every civilized ſociety. Such a work would be in fact the hiſtory of the intercourſe and communication of mankind, and muſt neceſſarily abound in events the moſt intereſting to every ſocial being, but particularly ſo to the people of this country, whoſe great importance in the eyes of *Europe* originated in commerce, and will endure no longer than whilſt the ſame attention continues to be paid to her commercial intereſts. In a diſſertation upon commerce, Inſurances form a very diſtinguiſhed part, and therefore it cannot but be agreeable to the ſcholar as well as to the lawyer, to trace this branch of commercial law to its ſource, and to give ſome account of thoſe various nations, which have been rendered famous by the extent of their commerce, and by the excellency of their

maritime regulations. Indeed, in tracing the origin of Inſurances, an account of the maritime ſtates that have exiſted in the world, neceſſarily forms a part of the enquiry.

2 Blackſt. Comm. 458.

Inſurance then is a contract by which the inſurer undertakes, in conſideration of a premium equivalent to the hazard run, to indemnify the perſon inſured againſt certain perils or loſſes, or againſt ſome particular event. When inſurance is generally mentioned by profeſſional men, it is underſtood to ſignify marine inſurances. It is in this light we are at preſent to conſider it; and from the preceding definition it appears to be a contract of indemnity againſt thoſe perils, to which ſhips or goods are expoſed in the courſe of their voyage from one place to another. The utility of this ſpecies of contract in a commercial country is obvious, and has been taken notice of by very diſtinguiſhed writers upon commercial affairs. Inſurances give great ſecurity to the fortunes of private people, and by dividing amongſt many that loſs, which would ruin an individual, make it fall light and eaſy upon the whole ſociety. This ſecurity tends greatly to the advancement of trade and navigation, becauſe the riſk of tranſporting and exporting being diminiſhed, men will more eaſily be induced to engage in an extenſive trade, to aſſiſt in important undertakings, and to join in hazardous enterpriſes; ſince a failure in the object will not be attended with thoſe dreadful conſequences to them and their families, which muſt be the caſe in a country where inſurances are unknown. But it is not individuals only that derive advantages from the increaſe of

3 Smith's Wealth of Nations, p. 148, oct. ed.

1 Magens 2.

commerce, the general welfare of the public is alſo promoted. It is an obſervation juſtified by experience, that as ſoon as the commercial ſpirit begins to acquire vigour, and to gain the aſcendant in any ſociety, we immediately diſcover a new genius in its policy, its alliances, its wars and negotiations. No nation, that cultivated foreign commerce, ever failed to make a diſtinguiſhed figure on the theatre of the world, as the hiſtory of the ancients ſufficiently proves; and in proportion as commerce made its way into the various ſtates of *Europe*, they turned their attention to thoſe objects, and aſſumed thoſe manners, which diſtinguiſh poliſhed nations, and which lead to political conſequence and eminence amongſt the neighbouring powers. (*a*)

The origin of inſurance, like that of many other cuſtoms, which depend rather upon traditional than written evidence, and for the honour of inventing and introducing which rival nations contend, has occaſioned much doubt among the writers upon mercantile law. Indeed it is involved in ſo much obſcurity that, after all the reſearches which have been made on the preſent occaſion, any very ſatisfactory ſolution of this doubt cannot be promiſed. One truth however is clear, that, wherever foreign commerce was introduced, inſurance muſt have ſoon followed as a neceſſary attendant, it being impoſſible to carry on any very extenſive trade without it, eſpecially in time of war. Some of theſe writers have aſcribed the origin of this contract to *Claudius Cæſar* the fifth *Roman* emperor, on ac- Molloy, Malyne.

(*a*) Vide Robertſon's View of the Progreſs of Society in Europe.

2 Atkyns, 554.

count of a paſſage to be found in *Suetonius*. Other reſpectable authorities have given the honour of it to the *Rhodians*, thus laying a foundation for the idea entertained by many, that the law of inſurance had obtained a place in moſt of the ancient codes of juriſprudence. As the conſideration of this queſtion will be attended with pleaſure, it will tend much to the complete inveſtigation of it, to conſider the ſtate of commerce amongſt the moſt diſtinguiſhed of the ancient nations, from whence it will appear, that inſurances were in thoſe days wholly unknown; or, if they were known, that the ſmalleſt proofs of the exiſtence of ſuch a cuſtom have not come down to the preſent times.

Schomberg's Obſerv. on Rhodian laws.

The *Rhodians* claim the firſt place in this enquiry: for although there is undoubted teſtimony, that nations of much greater antiquity than the people of *Rhodes*, (*a*) cultivated commerce, and carried it on to a conſiderable extent, yet there does not appear to be the ſmalleſt ground for entertaining an opinion that any of theſe naval powers had eſtabliſhed amongſt themſelves, much leſs communicated to mankind in general, any code or ſyſtem of marine law. *Rhodes* obtained the ſovereignty of the ſea, about 916 years before the *Chriſtian Æra*, which was almoſt two hundred years before the building of *Rome*. The ſituation and fertility of this iſland were peculiarly favour-

(*a*) Euſebius, in his account of maritime ſtates, mentions three anterior to the Rhodians; namely, the Cretans, the Lydians, and the Thracians; the firſt of whom flouriſhed about five hundred years before the Rhodians, the next two hundred, and the laſt, about eighty years. Euſeb. Chronicon. lib. 2.

able

ble for the purpoſes of navigation, for it lies in the *Mediterranean* ſea, a few leagues from the continent of *Leſſer Aſia*; and its wealth and fertility have always been celebrated by the poets and hiſtorians of antiquity. From theſe circumſtances, joined to the activity and induſtry of the people, it long maintained that ſuperiority which it had acquired; its inhabitants were rich, its alliance was courted, though, from principles of policy, it generally obſerved a ſtrict neutrality. Notwithſtanding this pacific diſpoſition, which commerce naturally inſpires, the *Rhodians* at laſt became an object of jealouſy, and were moſt furiouſly attacked and beſieged by various foreign powers. But in all their wars they diſcovered their great ſtrength and ſuperiority at ſea, and conducted their enterpriſes with ſo much activity and ſkill, as to attract the admiration of their enemies, and the applauſe of thoſe hiſtorians who have given an account of the wars in which they were engaged. In the *Punick* wars, the *Romans* found the benefit of their alliance, by the very eſſential ſervice which they performed, in attacking the naval armaments of the *Carthaginians*.

See Anderſon's Hiſt. of Commerce.

Polybius, lib. 16. Schomb. Obſ.

Wealth naturally produces luxury, which gradually enervates the powers of a ſtate. This was the caſe with the *Rhodians*; for after maintaining their political importance from the time already mentioned till the termination almoſt of the *Roman* republic, they viſibly began to decline in wealth and power. *Cicero*, in his ſpeech on the *Manilian* law, obſerves, that they were a people, whoſe naval power and diſcipline remained even to the time

Cicero pro lege Manilia, cap. 13.

of his memory; and *Cicero* expired with the republic.

From this ſhort hiſtory it appears, that the *Rhodians* were very famous for their naval power and ſtrength: but however reſpectable they might be on that account, they were much more illuſtrious, and obtained a much higher praiſe among the nations of antiquity, for being the firſt legiſlators of the ſea, and for promulgating a ſyſtem of marine juriſprudence, to which even the *Romans* themſelves paid the greateſt deference and reſpect, and which they adopted as the guide of their conduct in naval affairs. Theſe excellent laws not only ſerved as a rule of conduct to the ancient maritime ſtates; but, as will appear from an attentive compariſon of them, have been the baſis of all modern regulations reſpecting navigation and commerce. The time at which theſe laws were compiled is not preciſely aſcertained: but we may reaſonably ſuppoſe, it was about the period when the *Rhodians* firſt obtained the ſovereignty of the ſea, which was about 916 years before the æra of Chriſtianity. *Selden* ſays, that the *Rhodians* maintained the ſovereignty of the ſeas 23 years; and that their laws were compiled in the days of *Jehoſaphat*, king of *Judah*. This opinion agrees exactly with the preceding calculation; for this king began his reign about 914 years before the birth of *Chriſt*. Notwithſtanding this, it will always remain a doubtful point, when they were compiled; nor perhaps is it very material that it ſhould be accurately aſcertained. It is of more conſequence to know when they were adopted by the *Romans*; but

Selden's Mare clauſum, lib. 1. cap. 10. ſ. 5.

but that is alſo a fact involved in ſome obſcurity. We meet with no traces of them in the time of the republic; and from the manner in which *Cicero* mentions them in the ſpeech laſt alluded to, he treats of them as laws, which had gained the admiration of the world, rather than of ſuch as then made a part of the *Roman* code. *Selden* ſays, that they obtained a place in the *Roman* law in the reign of *Tiberius Claudius*, a conjecture in which he is ſupported by *Peckius*, one of the commentators on the laws of *Rhodes*, and by the well known character of *Tiberius* himſelf, who diſcovered the greateſt attention to maritime affairs, and gave many ſignal inſtances of his attachment to *Rhodes*. But although theſe iſlanders were thus famous for their laws, we cannot diſcover from the fragments that have come down to our times, that they had the ſmalleſt idea of the contract of inſurance; nor is there any tradition to induce us to conjecture, that they ever were acquainted with that mode of ſecuring their property. It is true, that this is not a concluſive argument; becauſe, although no ſuch contract is mentioned in the fragments which we have, it by no means follows that it did not form a part of their whole ſyſtem, more eſpecially as *Emerigon*, a very celebrated *French* writer, is of opinion, that the real laws of the *Rhodians* have never reached us; and that the fragments which we ſee, are certainly apocryphal. But as theſe laws were adopted by the *Romans*, it is fair to conjecture, that whether we have the real regulations of *Rhodes* or not, we ſhould have the contract of inſurance,

Schomberg Obſ. on Rhodian Laws.

Mare clauſum, lib. 1. cap. 10. f. 5.

Sueton. Vita Tiberii Claudii.

Emerigon traité des Aſſurances, preface, p. 3.

if it had been known to them, incorporated with the other naval laws in the Imperial code. This idea is countenanced by the contract of bottomry, which is to be found in the fragments of the laws of *Rhodes*, and with which the people of that iſland were certainly acquainted; and in every book of the civil law, the contract *de nautico fœnore*, *de uſurâ maritimâ*, alſo forms a conſiderable part. It is not going too far then to preſume, that, as the *Romans* adopted a contract ſo beneficial to commerce, as that of bottomry, they would not have paſſed over a contract, of which the influence is ſtill more extenſively uſeful in the promotion of navigation and trade, if thoſe, from whom they borrowed their naval laws, had themſelves been acquainted either with its nature or advantages.

Leg. Rhod. ſ. 1. art. 21. ſ. 2. art. 16. Digeſt. lib. 22. tit. 2. Cod. lib. 4. tit. 33.

Having ſaid thus much of *Rhodes* and its laws, let us turn our attention ſhortly to the commerce of the *Greeks*. It is certainly true, that commerce flouriſhed very much in ſeveral of the ſtates of *Greece*, particularly in *Corinth* and *Athens*. The former ſeparated two ſeas, was the key of *Greece*, and a city of the utmoſt importance; its trade was extenſive, having a port to receive the merchandizes of *Aſia*, and another, thoſe of *Italy*; and there have been but few cities where the works of art were carried to ſo high a degree of perfection. *Athens* indeed was particularly famous for commercial knowledge; for their manufactures of all ſorts were in high repute, and emulation was excited by the public rewards and honours which were beſtowed upon thoſe who attained to excellence

Monteſq. Eſprit des loix, liv. 21. ch. 7.

Taylor's Civil Law, p. 507.

lence in any of the uſeful arts. The attention of this people to maritime affairs, (for they aimed at the ſovereignty of the ſea and obtained it), contributed much to their ſkill in navigation. The many laws which they left to poſterity, with regard to imports and exports, and the contract of bargain and ſale; the many privileges granted to the mercantile part of the ſtate; the appointment of magiſtrates, who had the cognizance of controverſies that happened between merchants and mariners; the attention which they paid to their market, and the many officers concerned in that department, give us a very favourable idea of their judgment in the true principles of commerce. But notwithſtanding this, the *Athenians*, being of a very ambitious diſpoſition, being more attentive to extend their maritime power than to enjoy it, and having a government of ſuch a caſt, that the public revenues were diſtributed among the common people to be ſquandered at their pleaſure, (*a*) did not carry on ſo extenſive a trade as might naturally be expected from the number of their ſeamen, from the produce of their mines, from their influence

Potter's Grecian Antiq. vol. i. p. 80, 83, 84, 167.

(*a*) From ſeveral of the orations of Demoſthenes it appears, that the poor were entitled to receive from the public ſtock, as much money as would admit them to the diverſions of the theatre; and beſides this, it was made a capital offence for any one to propoſe the reſtoration of the theatrical money to its original uſes. This cuſtom was at length ſo much abuſed, that, under pretence of theatrical money, almoſt all the public funds were diſtributed among the people. Hence the Athenians contracted an averſion for war, and ſpent their time and money upon public ſhews. Of this enormity Demoſthenes vehemently complains, and inveighs againſt it with as much warmth as, from the nature of the law juſt mentioned, he durſt venture to do. See the firſt and alſo the third Olynthian.

over

over the cities of *Greece*, and from thoſe excellent laws and inſtitutions, which have been juſt enumerated. Their trade was almoſt entirely confined to *Greece* and to the *Euxine* ſea. From ſuch of their laws as we have ſeen, and from ſuch accounts as we have obtained of their naval hiſtory, we have not the ſmalleſt reaſon to ſuppoſe, that this celebrated people knew any thing of the contract of inſurance.

Monteſq. Eſprit des loix, liv. 21. c. 7.

Some notice ſhould have been taken before now of the *Phenicians*, an ancient commercial and opulent people. Indeed, the height of grandeur to which they attained is a ſufficient proof of the vaſt reſources of a commercial nation. Many writers, both ſacred and profane, from their florid and magnificent deſcriptions, give a vaſt idea of their wealth and power. I forbore to ſpeak of them till I ſhould have occaſion to mention one of their colonies, that of *Carthage*, which, in opulence and the extent of her commerce and naval power, equalled, if not ſurpaſſed, the parent ſtate herſelf. Whether either, or both, of theſe maritime powers ever promulgated any code of naval law cannot now be aſcertained: for the former was entirely deſtroyed by *Alexander the Great*; and that it might never be reſtored, he removed its marine and commerce to *Alexandria*, in which removal, probably all its naval regulations might be loſt. *Carthage*, on the other hand, having long diſputed with *Rome* the empire of the world, was at laſt obliged to yield to her victorious rival, who, even after ſhe gained the victory, retained ſuch an hatred to the *Carthaginians*, that ſhe rooted out every

Beawes Lex Merc. red. 4th edit. Introd. p. 3.

Quint. Curtius, lib. 4. cap. 8, &c.

every veſtige of their former greatneſs. No time, however, nor the hatred of the *Romans*, can wholly obliterate the amazing accounts which have come down to us, of the enterpriſing ſpirit, and hazardous voyages of the *Carthaginians*, almoſt exceeding the bounds of credibility. Thus much is certain, that they took ſuch diſtant voyages, and went ſo far even without the *Mediterranean*, both to the *South* and *North* of it, as induced many people to ſuppoſe, that they were acquainted with the uſe of the compaſs. It is evident, however, that they only followed the coaſts. Beſides the ancients might ſometimes have performed ſuch voyages, as would make one imagine they had the uſe of the compaſs; for if a pilot were far from land, and during his voyage had ſuch ſerene weather that in the night he could always ſee the polar ſtar, and in the day, the riſing and the ſetting ſun, he might regulate his courſe by them, nearly as we do now by the compaſs. This however muſt be a fortuitous caſe, and not a regular plan of navigation. (*a*)

Anderſon's Hiſt. of Commerce. Introd. p. 31, 32. fol. ed.

Monteſq. liv. 21. ch. 8.

(*a*) What I have ſaid in the text has been ſuppoſed by ſome not to do ſufficient juſtice to the commercial and enterpriſing ſpirit of the Phenicians, who are ſaid to have viſited Britain about 900 years before Chriſt*. I have already admitted the almoſt incredible voyages which they performed; but as it is alſo undoubtedly true, that they were unacquainted with the mariner's compaſs, the honour of diſcovering which was reſerved for later times, they muſt, in moſt caſes, have followed the coaſts. Nor does their viſiting Britain militate againſt this idea; for by attending to the ſituation of the two places, the voyage might have been performed, though no doubt very tediouſly, without once loſing ſight of land.

* See Borlaſe's Hiſt. of Cornwall, p. 27, and Henry's Hiſt. of Great Britain, book 1. chap. 6.

From

From a ſlight attention to the commercial and maritime hiſtory of the *Romans*, it will appear that they were as great ſtrangers to the contract of inſurance, as any of thoſe people, of whom much has been already ſaid. It ſeems to be univerſally agreed that the *Romans* were never very conſpicuous as a maritime power, conſidered either in a commercial or warlike point of view. In the latter caſe they relied chiefly on their land forces, who were diſciplined to ſtand always firm and undaunted; and till towards the latter age of the republic, when we read of ſome wonderful naval exertions, they do not ſeem to have poſſeſſed any thing of a marine eſtabliſhment. They never were diſtinguiſhed by a jealouſy for trade, and even when they attacked *Carthage*, they did it as a rival for empire, and not for commerce. It is recorded by hiſtorians, that till the firſt *Punick* war, upwards of 400 years after the building of the city, the *Romans* were ſo entirely ignorant of ſhip building, that they took for a model a *Carthaginian* galley, which had been accidently ſtranded at *Meſſina*. *Carthage*, it muſt be obſerved, was at that time in her zenith of power and greatneſs; and yet from the model of one of her gallies, the *Romans* were able in ſixty days from the time the timber was cut down, to fit out and man for ſea, one hundred gallies, of five tiers, and twenty of three tiers of oars. Such were the ſhips of the famous *Carthage*. The ſpirit of the people of *Rome* was entirely averſe from commerce; and fully juſtifies what was ſaid by a celebrated *Roman* hiſtorian, "*ſeſe quiſque hoſtem ferire, murum adſcendere, conſpici, dum tale facinus faceret, properabat; eas divitias,*

Monteſq. liv. 21. ch. 9.

Ferguſon's Rom. Rep. vol. i. p. 100.

Salluſt. Catilina, cap. 7.

" *divitias, eam bonam famam, magnamque nobilitatem* " *putabant.*" Theſe exploits were the only glory of a *Roman*, no employment was deemed honourable but the plough and the ſword, and every ſpecies of gain was deemed diſgraceful to thoſe of Patrician rank. But it was from the conſtitution of the government, that individuals were poſſeſſed of this warlike ſpirit, ſo contrary to that which leads to eminence in commercial purſuits. The caſt of their civil government was of a military nature; and for a conſiderable time, the civil and military officer was the ſame perſon; he diſtributed juſtice in *Rome*, and commanded their legions in the field, till the vaſt increaſe of their empire, and the multiplicity of civil buſineſs, occaſioned a ſeparation. The natural conſequence of this was, that no man who was not of the profeſſion of his country, was much eſteemed at *Rome*; and accordingly we find that traders and mechanics were incapable of ſucceeding to any public honours. Nay, ſo far was commerce from being encouraged at *Rome*, that it was deemed prejudicial to the ſtate. The *Romans*, by humanity, terror, triumphs, tributes, and taxes, which they impoſed on the conquered countries, increaſed the riches of their city. Laws were paſſed to prevent the exportation of their gold; the reaſon of which ſeems to be, that it carried away their money and brought them nothing in return but luxury, the bane of virtue, and deſtruction of empire. Could it be expected, ſays Doctor *Taylor*, that a people of ſoldiers, whoſe trade was their ſword, and whoſe ſword ſupplied all the advantages of trade; who brought the treaſures of the world into their exchequer, without

Livy, lib. 21. cap. 63.

Taylor's Civil Law, p. 502.

Taylor, 498.

Civil Law, 501.

exporting any thing but their own perſonal bravery; who raiſed the publick revenues, not by the culture of *Italy*, but by the tributes of provinces; who had *Rome* for their manſion, and the world for their farm; ſhould have leiſure to ſet forward the articles of commerce, or be likely to pay any regard to the character of its profeſſors? The terms of defiance, upon which they lived with all mankind, in conſequence of this martial ſpirit, would have prevented all the good effects of commerce, had their diſpoſition allowed them to purſue it. That reſtleſs ſpirit, which kept their armies on foot, and their ſwords in their hands, for a ſucceſſion of centuries, was fatal to factories and correſpondence. The world was in arms, and inſurances and under-writing were but a dead letter. This is very nearly a true repreſentation of the caſe, for it is certain that not one law was made in favour of commerce, in the time of the commonwealth; on the contrary, it was greatly diſcouraged as introductory of luxury, which was ſuppoſed not to be compatible with the ſeverity of their manners. It is alſo no leſs true than ſingular, that a people who were ſo well acquainted with the true principles of natural reaſon and juſtice, who applied thoſe principles with ſo much propriety to the various wants and neceſſities of human ſociety, and who had the honour of eſtabliſhing a ſyſtem of law, which has been adopted as the rule of action by the greateſt part of *Europe*, and which continues to be ſo even at the preſent day, never attempted to introduce any plan of marine juriſprudence. Nay, this idea is carried farther by ſome writers, who declare, and I believe with truth,

Schomberg's Obſervations on the Rhodian laws.

truth, at leaſt we can diſcover nothing to the contrary, that the *Romans* did not even take the pains to digeſt the materials which they had borrowed; and that whilſt they carried every other branch of law to the higheſt pitch of accuracy and refinement, they were content to ſtand indebted to one of their own provinces both for the form and matter of their maritime code.

The *Romans*, it is true, after the firſt *Punick* war, conſtantly maintained a fleet; but long after that time, even in the year of the city 563, it was obſerved of them, that they were very unſkilful in the art of navigation. One of their own hiſtorians, who flouriſhed at the time of the ſecond *Punick* war, and who was tutor to the great *Scipio*, juſtly remarks, that at no period did they ever make any figure at ſea as a commercial power. Even when they arrived at their higheſt perfection in naval ſkill, their fleets were never employed for the purpoſes of trade, in the diſcovery of new ſtates, or eſtabliſhing commercial intercourſe with thoſe they already knew. The greateſt extent of their commerce was to bring to the market of *Rome* that corn, which they collected in the various granaries of *Sicily*, *Africa*, and *Egypt*. Upon all other occaſions the buſineſs of their fleet was to overawe the conquered, and to tranſport to *Rome* the ſpoils of ruined provinces. In ſuch a ſtate of commerce, it is impoſſible that inſurances could exiſt; and we have already quoted the opinion of a reſpectable author to ſhew that they were unknown.

Polybius.

Dr. Taylor, ut ſupra.

There

There are ſeveral reaſons applicable to all the ancient maritime powers, which ſeem to prove to demonſtration, that inſurances were not in uſe. We have ſeen, that inſurances are only introduced where commerce is widely extended. The commerce of the ancients, compared with modern times, could not be very conſiderable, as it was chiefly confined within the *Mediterranean*, *Egean*, and *Euxine* ſeas; to which they were compelled more from neceſſity than inclination. *Carthage* in all her glory had not arrived at any great degree of perfection in the art of ſhip building. Veſſels of the beſt conſtruction at that time could only be navigated with oars, or when they had a fair wind on a ſmooth ſea: they might be built of green timber; and in caſe of a ſtorm, could run aſhore under any cover, or upon any beach that was free from rocks: in ſhort, they were merely gallies, and were managed with the greater difficulty on account of the poſition of the ſails, and the mode of rigging practiſed in thoſe days. This could not fail of proving a conſiderable obſtacle to the extenſion of commerce. But when we conſider, in addition to the bad conſtruction of their ſhips, that the ancients were utterly ignorant of that unerring guide, the mariner's compaſs, (the honour of inventing which was reſerved for more modern times), by reaſon of which they durſt not venture out of ſight of land, for fear of being overtaken by tempeſts, and being left at large in the boundleſs ocean, their commerce could not have been great; although we are even led to admire the progreſs which they made in commercial affairs. It is true, that many diſtant naval expeditions were made under all theſe diſadvantages,

Anderſon's Hiſt. of Commerce.

Monteſq. Eſprit des loix, liv. 21. ch. vi.

diſadvantages, which often proved fatal to the adventurers. (*a*) Theſe expeditions, however, could add little or nothing to their maritime or geographical ſkill, in which the ancients were certainly very deficient, on account of the neceſſity they were always under of coaſting the ſhores, for want of a better guide; and indeed, the ſhores were the only compaſs. Theſe obſervations are not intended to detract from that merit, which has been already allowed to the ancients for their naval exertions; becauſe they are founded merely on a compariſon of their powers and knowledge in thoſe arts with the improvements of the moderns, and are adduced to ſhew that, under ſuch diſadvantages and obſtacles to the extenſion of their trade and commerce, it was impoſſible that inſurances could be at all known to the ancient world. (*b*)

Monteſq. vol. ii. ch. 6.

M. *Emerigon* agrees, that the contract of inſurance, as it is underſtood at this day, was not in uſe amongſt the *Romans*; but he thinks he diſcovers ſome traces of it in the hiſtory of that people. The firſt inſtance given by this learned writer is this, that about the time of the ſecond *Punick* war, thoſe who had undertaken to ſupply the troops in *Spain* with proviſions and military ſtores, made it a previous condition that the republic ſhould be at the hazard of exporting them, according to the words

Preface to his work, p. 4.

(*a*) Huet, biſhop of Avranches, in his very inſtructive and entertaining treatiſe on the commerce and navigation of the ancients, has with infinite labour and accuracy collected the moſt remarkable facts on this head. Ch. 8.

(*b*) See note (*a*) page 10.

Livy, lib. 23. cap. 49.

of *Livy*, "*Ut quæ in naves impoſuiſſent, ab hoſtium, "tempeſtatiſve vi, publico periculo eſſent.*" But with all deference to ſo great a name, this ſeems to bear no reſemblance to the contract of inſurance; for it is nothing more than every well regulated ſtate is bound to do by the ties of natural juſtice. It is equitable and right, that thoſe, who in times of public danger, appropriate their private wealth to the advancement of the public ſervice, ſhould be reimburſed from the purſe of the ſtate for the private loſſes they may ſuſtain. This indeed is the rule of conduct between man and man: for when one man purchaſes goods of another to be ſent abroad, was it ever ſuppoſed that the ſeller was to run the riſk of the voyage; or that if the goods periſhed, he was never to be paid? If ſuch a doctrine were to prevail in any country, the ſtate could only be ſupplied with neceſſaries in time of war, by means of extortion, rapine, and violence.

Traité des Aſſur. loc. cit. Livy, lib. 25. cap. 3.

Another inſtance given by *Emerigon* is a ſtory, which we find recorded by *Livy*, of ſome men who were charged with the care of exporting proviſions for the army, and who, *quia publicum periculum erat a vi tempeſtatis in iis, quæ portarentur ad exercitus*, endeavoured by fraud to deſtroy the ſhip, and then told the directors of the ſtate, that many very valuable articles were on board; whereas they had taken care to ſend out very old, rotten ſhips, in which were a few commodities, and thoſe of ſmall value. That part of this ſtory which is material to the preſent enquiry, has already met with an anſwer in what was ſaid upon the laſt quotation; and the propriety of a government's indemnifying

thoſe

thoſe who might ſuffer in the public ſervice, is not at all altered by the miſconduct of ſome individuals. (*a*)

The next inſtance is from one of *Cicero*'s epiſtles, and is of a different nature from thoſe laſt mentioned; becauſe here *Cicero* ſeems to wiſh that the property in queſtion ſhould be ſecured, not only for himſelf, but alſo for the people of *Rome*. *Cicero*, having gained a victory in *Cilicia*, and the civil war between *Cæſar* and *Pompey* being then a matter almoſt unavoidable, wrote to *Caninius Salluſtius* at *Laodicea*, in which letter he uſes theſe words: "*Laodiceæ me prædes accepturum arbitror omnis pe-*" *cuniæ publicæ, ut et mihi et populo cautum ſit ſine vec-*" *turæ periculo.*" From this paſſage it is inferred that *Cicero* alludes to an inſurance. I own, from the meaning of the word *prædes*, and from the ſituation of affairs at *Rome*, it ſeems as if *Cicero* wiſhed rather to find ſome ſecure and ſubſtantial perſon at *Laodicea*, in whoſe care and cuſtody he might leave this money till more peaceable times; and it is very unlikely that in ſuch a troubleſome conjuncture he ſhould be deſirous of bringing a great treaſure to the ſcene of faction and confuſion, eſpecially as, in a letter to his friend *Atticus*, he declares himſelf at a great loſs to know what line of conduct he ought to purſue. But even if he wiſhed to bring it

Epiſtolæ ad Familiares, lib. 2. epiſt. 17.

Ferguſon's hiſt. of the Rom. Rep. book 4. ch. 5

Cicero ad Atticum, lib. 7. epiſt. 1.

(*a*) It has been truly obſerved by Mr. Millar, that in theſe inſtances from the Roman hiſtorians, no mention is made of a premium paid by the merchant for the hazard undertaken; and that they are rather to be conſidered as examples of a bounty offered by the publick, than of a mutual contract.

Millar on Inſurances.

to *Rome*, the mode he propoſed ſeems more like the modern bill of exchange, than a policy of inſurance. (*a*) Beſides, unleſs this ſpecies of contract was at that time tolerably well underſtood, *Salluſt*, the perſon to whom he wrote, would have found conſiderable difficulty in comprehending his meaning from the ſingle ſentence in his letter which has been mentioned; and if it were well known, is it poſſible to ſuppoſe it would not have obtained a place in their code of laws?

Molloy, Malyne.

But the paſſage upon which thoſe, who contend for the antiquity of this branch of commerce, have chiefly relied, is one to be found in *Suetonius*, in the eighteenth chapter of his life of *Tiberius Claudius*, the fifth emperor of *Rome*. "*Negotiatoribus certa* "*lucra propoſuit, ſuſcepto in ſe damno, ſi cui quid per* "*tempeſtates accidiſſet.*" This ſentence wholly unconnected ſeems to convey ſuch an idea; but we muſt attend to the context in order to underſtand it. This relates merely to the corn trade; for as the *Roman* territory was not ſufficient to ſupply enough for the conſumption of the city, it became abſolutely neceſſary to give great encouragement to this branch of commerce: nay it was a political, not a mercantile concern, for the very exiſtence of the

(*a*) Since I publiſhed the firſt edition of this work I have looked into Melmoth's tranſlation of Cicero's epiſtles; and I am happy to find that, without knowing I had ſuch an authority, I have put the ſame ſenſe upon this paſſage which that elegant tranſlator had done before me. The whole ſentence is tranſlated thus: "I pur- "poſe to leave the money at Laodicea, which ſhall ariſe from the "ſale of thoſe ſpoils, and *to take ſecurity* for its being paid in "Rome: in order to avoid the hazard both to myſelf and the "commonwealth of conveying it in ſpecie."

empire depended upon it. It was this circumſtance which induced the emperor to pay ſuch regard to this branch of trade, to propoſe bounties, and to confer certain privileges, the *certa lucra*, of which *Suetonius* ſpeaks, upon thoſe who would venture out to ſea for the public ſervice in the midſt of winter. Dr. *Taylor* tells us, that a private conſideration alſo had ſome weight with *Claudius* upon this occaſion; for that once, in a great ſcarcity of proviſions, he was attacked in the forum by the populace, and ſo diſagreeably treated with abuſe, and cruſts of ſtale bread, that he with great difficulty eſcaped through ſome private paſſage; from which time he made it his great care and concern to get corn imported, even in the winter. As to the riſk which *Suetonius* ſays the emperor took upon himſelf, it is to be obſerved, that although the ſhips were private property, yet they would not have gone to ſea in the dangerous ſeaſons they did, had it not been for the public ſervice, and to provide proviſions for the uſe of the whole city. This being the caſe, we have already ſhewn, that it would be contrary to the firſt principles of juſtice and equity, and to the practice followed at this day by all governments which are founded on juſt principles, to allow ſuch loſſes to fall upon individuals. (*a*) From what has been ſaid it appears evident, that the *Romans* had no knowledge of inſurances; in addition to which both *Grotius* and *Bynkerſhoek* have expreſsly declared, that

Civil Law, p. 499.

Grotius de Jure Belli, lib. 2. cap. 12. ſ. 3.

Bynk. quæſt. Juris Publici, lib. 1. cap. 21.

(*a*) The obſervations here made ſeem, upon examination, to be agreeable to the ideas of Dr. *Taylor*, the preſident *Monteſquieu*, and Mr. *Schomberg*, upon the ſame ſubject. See alſo the opinion of a learned civilian, *Langenbeck* of *Hamburgh*, in *Magn*'s Eſſay on Inſurances. Vol. i. p. 1.

among the ancients this contract was unknown; the latter of whom uſes theſe expreſſions: "*Adeo* "*tamen ille contractus olim fuit incognitus, ut nec no-* "*men ejus, nec rem ipſam in jure Romano deprehen-* "*das.*" (*a*)

But to whatever degree of excellence the *Romans* attained either in literature, commerce, or any of the refined arts, they all viſibly declined when the *Roman* empire was over-run by the barbarians; or, perhaps it may be ſaid with greater propriety, that they were over-whelmed and loſt with that power which had raiſed them to be the object of public attention and notice. For in times of public ruin and deſolation, when war rears its ſtandard, lays waſte cities, and tramples on the nobleſt improvements, it is impoſſible for commerce to hold its ſta-

(*a*) By a late work of *M. De Pauw*, entitled *Recherches Philoſophiques ſur les Grecs*, it is manifeſt that the *Athenians* were well acquainted with the nature of bills of exchange; and this learned foreigner ſeems to think it a matter of uncertainty whether the inſurances of ſhips was ever practiſed among them: but he ſays it is clear that barratry was not unknown to them. I am inclined, however, to think with *Grotius* and *Bynkerſhoek*, that this contract was as much unknown to that great people as to the reſt of the ancient world. If this had not been the caſe, can it be ſuppoſed that we ſhould find no trace of it in their hiſtory, the ſpeeches of their orators, or their laws? Is it not as likely to have been mentioned as bills of exchange; and particularly when barratry was mentioned, if this contract had had an exiſtence, would it not have been ſtated, on whom the loſs was to fall? Beſides, the inſtance given of barratry by *M. De Pauw* is not what we call barratry in *England*; for the caſe put is a caſe of fraud committed by the owners, who, by the law of *England*, cannot commit barratry, *which is a criminal act of the captain, to the prejudice of his owners, and without their privity or conſent.*

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tion, or to flouriſh in the midſt of contention and tumult.

It is the obſervation of a profound modern hiſtorian, that there is an ultimate point of depreſſion, as well as of exaltation, from which human affairs naturally return in a contrary progreſs, and beyond which they ſeldom paſs in their advancement or decline. This was the caſe with reſpect to commerce. When the repeated incurſions of the Barbarians had ravaged the *Roman* empire, and had checked every liberal improvement, ſome people, forced by neceſſity, or led by inclination, took ſhelter in a few marſhy iſlands that lay near the coaſt of *Italy*, and which would never have been thought worth inhabiting in time of peace. This happened in the ſixth century; and at the firſt ſettling of theſe wanderers, they had certainly no other object in view, than that of living in a tolerable degree of ſecurity from their enemies, and of procuring a moderate ſubſiſtence. As theſe iſlands were divided from each other by narrow channels, and thoſe channels were ſo encumbered by ſhallows, that it was impoſſible for ſtrangers to navigate them, they found that ſecurity which they wiſhed; and by uniting among themſelves for the ſake of improving their condition, they became in the eighth century a well eſtabliſhed republic. This, though it may appear ſtrange, was the origin of the famous republic of *Venice*, which ſoon became a great commercial power; for, from the firſt moment that thoſe people took poſſeſſion of the iſlands, neceſſity made them extremely attentive to commerce; the firſt beginning of which was naturally fiſhing. Next to

Hume.

Anderſon's Hiſtory of Commerce, fol. vol. i. p. 19, 20.

fiſhing, they began to trade in ſalt, many pits of which were diſcovered in their own iſlands; and at laſt their city gradually became the magazine for the merchandize of the neighbouring continent on all ſides, and they themſelves the general carriers of *Europe*. Thus to the people of *Italy*, and to thoſe of *Venice* and *Genoa* in particular, we are to attribute the re-eſtabliſhment of commerce. Of the cauſes which contributed to its revival, it remains to ſpeak.

Various cauſes concurred to revive the ſpirit of commerce, and to renew, in ſome degree, that intercourſe between nations, which, during the period of *Gothic* ignorance and barbarity, had been much interrupted. The religious wars of the eleventh century, called the Cruſades, by leading many from every part of *Europe* into *Aſia*, opened an extenſive communication between the Eaſt and Weſt; and though the avowed purpoſe of theſe expeditions was conqueſt, and not commerce; though the iſſue of them proved as unfortunate, as the motives of undertaking them were wild and enthuſiaſtic, yet their commercial effects were beneficial and laſting. For the firſt armies, which ranged themſelves under the banner of the Croſs, having been led through a vaſt extent of country, and having ſuffered ſo much from the length of their march, and the barbariſm and inhoſpitality of the people inhabiting thoſe countries through which they travelled, others were deterred from taking the ſame courſe; and choſe rather to go by ſea, than encounter ſo many hardſhips. *Venice*, *Genoa*, and *Piſa*, furniſhed the tranſports to convey the troops: and

Robertſon's View of Society, &c.

it

It is reported, that the ſums were immenſe which they received merely for freight. Beſides this, the Cruſaders contracted with them for ſupplies of military ſtores and proviſions; their fleets hovered on the coaſt; and by ſupplying the army with whatever was wanting, they engroſſed all the advantages ariſing from this branch of commerce. Theſe ſtates were alſo benefited by the ſucceſs which attended the arms of theſe religious and enthuſiaſtic heroes; for there are charters yet extant, containing grants to the *Venetians*, *Piſans*, and *Genoeſe*, of great privileges in the various ſettlements, which the Chriſtians had gained in *Aſia*. When the Cruſaders ſeized *Conſtantinople*, the *Venetians*, who had planned the enterprize, transferred to their own State many of the valuable branches of commerce, which had formerly centered in *Conſtantinople*. Another great cauſe of the revival of commerce, was the invention of the Mariner's Compaſs, which, by rendering navigation more ſecure as well as more adventurous, facilitated the communications between remote nations, and brought them nearer to each other. The honour of this invention, ſo beneficial to mankind, has been claimed by the *French*; and their claim has been allowed by ſeveral authors, and maintained by a celebrated writer of their own. In this opinion perhaps national partiality may have ſome weight. Moſt authors, however, agree that the inventor was *Flavio de Gioia*, a native of *Amalfi*, an ancient commercial city in the kingdom of *Naples*. (*a*)

Huét Traité du Commerce des Anciens, cap. 10. Anderſ. Hiſtory of Commerce, fol. edit. vol. i. p. 144.

It

(*a*) It appears from *Anderſon*, that ſome people had ſuppoſed that the conqueſts of *Charlemagne* in *Italy*, towards the end of the 8th century, and his ſubſequent eſtabliſhment of Chriſtianity

Anderſon's introd. fol. edit. p. 7.

It is evident, that almoſt all the commerce of *Europe*, in thoſe days, centered amongſt the *Italians*. As they at that time carried on and eſtabliſhed a regular trade with the Eaſt in the ports of *Egypt*, and drew from thence all the rich produce of *India*; it is reaſonable to ſuppoſe, that, in order to ſupport ſo extenſive a commerce, theſe induſtrious and ingenious people were the firſt who introduced inſurances into the ſyſtem of mercantile affairs. It is true, there is no direct authority to warrant a poſitive aſſertion, that they were the inventors of this kind of contract: but it is certain, that the knowledge of it came with them into the different maritime ſtates, in which parties of them ſettled; and when it is admitted that they were the carriers, manufacturers, and bankers of *Europe*, it is probable that they alſo led the way to the eſtabliſhment of a contract, which is ſo eſſentially neceſſary to the ſupport and cultivation of commerce. It has, however, been aſſerted by writers of the *French* nation, (*a*) that inſurance dates its origin in the year 1182, and that it was introduced by the *Jews*, who were baniſhed from *France* about that period, and who took that method to facilitate and ſecure the removal of their effects. They proceed to ſay, that the *Lombards*, who were not idle ſpectators of this

Monſ. Savary Dict. Univ. Le Guidon, c. 1. art. 1.

Chriſtianity in the Weſtern and Northern parts of *Germany*, contributed greatly to the revival of commerce. In what I have ſaid upon this ſubject, I choſe rather to follow the ſteps of a very elegant and profound hiſtorian of modern times. *Robertſon*'s View of Society, &c.

(*a*) *Anderſon* ſays, the *Jews* were baniſhed from *France* in 1143. *Anderſon*'s Hiſtory of Commerce, vol. i. p. 82. But I believe ſuch an event twice took place in that kingdom.

contrivance,

contrivance, adopted it, and in a ſhort time improved it conſiderably. It is not very neceſſary to enquire into the truth of this fact, nor indeed are there materials to enable us to do ſo: but it is obſervable that the Preſident *Monteſquieu* mentions that the *Jews* upon this occaſion invented bills of exchange; but does not ſay a ſyllable of policies of inſurance. It is agreed, however, that if the *Lombards* were not the inventors, they were at leaſt the firſt who brought the contract of inſurance to perfection, and introduced it to the world. (*a*)

Eſprit des Loix, liv. 21, c. 16.

Before we come to conſider the amazing improvements which have taken place, with reſpect to this branch of commerce, in our own country, in theſe days, it will be expected that ſome notice ſhould be taken of thoſe maritime codes, and naval regulations, which have diſtinguiſhed the modern, no leſs than the laws of *Rhodes* did the antient world.

To the people of *Amalfi* we are indebted as well for the firſt code of modern ſea laws, as for the invention of the compaſs. We learn from *Anderſon*, that the city of *Amalfi*, ſo long ago as the year 1020, was ſo famous for its merchants and ſhips, that its inhabitants at that time obtained from the Caliph of *Egypt* a ſafe conduct, to enable them to

Vol. i. p. 58.

(*a*) I am aware that ſeveral learned men are of opinion, that inſurances were of an earlier date than is here aſcribed to them. On a ſubject where ſo much obſcurity muſt neceſſarily exiſt, I am by no means tenacious of my opinion; but the inclination of my mind is to adhere to the idea that the *Lombards* were the inventors. See alſo Mr. *Millar*'s Introduction.

trade

trade freely in all his dominions; and they alſo received from him ſeveral other diſtinguiſhed privileges. It was towards the cloſe of that century, that they promulgated their ſyſtem of marine law, which, from the place of its compilation, received the denomination of *Tabula Amalfitana*. This table ſuperſeded in a great meaſure the ancient *Jus Rhodianum*; and its authority was acknowledged by all the States of *Italy*, for ſome centuries. But as trade increaſed very rapidly in other cities on the coaſt of the *Mediterranean* ſea, they became unwilling to receive laws from a neighbouring ſtate, which they now equalled, if not ſurpaſſed, in the extent of their naval eſtabliſhments. Every one, therefore, began to erect a tribunal, in order to decide all controverted points, according to laws peculiar to itſelf; but ſtill referring, in matters of higher moment, to the former rule of action, the *Amalfitan* code. From ſuch a variety of laws, as muſt neceſſarily be the conſequence of each of the *Italian* ſtates becoming its own legiſlator, ſo much diſorder and confuſion aroſe, that general convenience at laſt compelled them to do that, which jealouſy of each others power and growing commerce would for ever have prevented them from effecting; and at a general aſſembly it was agreed to digeſt the laws of all the ſeparate communities into one body. Every regulation therefore, which was thought to be founded in juſtice either in the laws of *Marſeilles*, *Piſa*, *Genoa*, *Venice*, or *Barcelona*, was collected into one maſs, and publiſhed in the 14th century, under the title of *Conſolato del Mare*.

Hubner. A *French* writer *Sur la Saiſie des Batimens neutres*, ſpeaks of this production in a very unfavourable way; and

and calls it a rude ill-formed maſs of maritime and poſitive regulations, of ordinances of the middle ages, and of private deciſions. Indeed when we conſider that this was a compilation from the various regulations of ſo many different ſtates, it could not excite much ſurpriſe, if it really merited the cenſure of this author. But upon examination, it is a work of conſiderable merit; the deciſions it contains are founded on the laws of nations; it has been received and allowed to have the force of law in every part of *Italy*; and it is the ſource from whence the people of that country, as well as thoſe of *Spain* and *France*, have been ſaid to derive many of their beſt marine regulations. Unfortunately too, *Emerigon* has diſcovered, that becauſe one of the chapters in the *Conſolato del Mare* overturns ſome favourite ſyſtem of this learned author, he is out of humour with the whole compoſition. One thing, however, is clear, that neither the *Conſolato del Mare*, nor the *Amalfitan* code, upon which it is founded, contains any thing upon inſurance law, ſo that we have here another confirmation of the idea, that this contract was not a production of very ancient times. (*a*)

Vinnius in Peckium, 190.

Emerigon, preface, p. 8.

The ſpirit of commerce was not, however, confined to the South parts of *Europe*; it now began to extend itſelf among the inhabitants of the Weſtern coaſts. But whatever maritime regulations they might have eſtabliſhed among themſelves, they

(*a*) In what I have ſaid upon the *Amalfitan* code, I have found myſelf extremely indebted to Mr. *Schomberg's* very ingenious obſervations upon that ſubject, in his treatiſe on the maritime laws of *Rhodes*.

were

were found not to be ſufficiently extenſive for the commercial intercourſe which began to take place in thoſe countries in the courſe of the 12th century. Accordingly, about the year 1194, *Richard* the Firſt, king of *England*, on his return from his wild expedition to the *Holy Land*, having ſtaid to repoſe himſelf for ſome time at the iſle of *Oleron*, in the *Bay* of *Biſcay*, an iſland which he inherited in right of his mother, whoſe portion it was in marriage with his father *Henry* the Second, gave orders for the compilation of a maritime code. Some authors ſuppoſe that the hardſhips and dangers, to which, in the courſe of his expedition, he ſaw adventurers by ſea were expoſed, induced him to promulgate a law, by which their condition might be rendered more comfortable. Others imagine, and probably their ſuppoſition is better founded, that the great intercourſe between his *Engliſh* and *French* ſubjects, and their allies, required a certain general ſyſtem of ſea law, for the more ſpeedy and impartial determination of all diſputes which might occaſionally ariſe. The laws of *Oleron*, therefore, which are in ſubſtance but an abſtract of the old *Rhodian* laws, with ſome additions and alterations, accommodated to the practice of that age, and the cuſtoms of the Weſtern nations, were propoſed as a common ſtandard and meaſure for the more equal diſtribution of juſtice amongſt the people of different governments. Theſe excellent regulations were ſo much eſteemed, that they have been the model on which all modern ſea laws have been founded; and two diſtinguiſhed nations have contended for the honour of their production. *France*, jealous of the luſtre which the *Engliſh* juſtly derive from the production

Schomberg's Obſerv. on the Rhodian Laws.

Sir Philip Meadow's Obſerv. on the Dom. of the Sea, c. 4.

of this code, with much anxiety claims this honour to herſelf; and very diſtinguiſhed authors have ſtood forth the champions of her claim. The ſubſtance of their argument is, that *Eleanor*, wife of *Henry* 2d king of *England*, and Ducheſs of *Guyenne*, returning from the *Holy Land*, and having ſeen the beneficial effects of the *Conſolato del Mare*, ordered the firſt draught of the judgments or laws of *Oleron* to be made: *that her ſon Richard the Firſt, returning from the ſame expedition, enlarged and improved* what his mother had begun: that they were certainly intended for the uſe of the *French* merely, becauſe they were written in the old *Gaſcon French*, without any mixture of the *Norman* or *Engliſh* languages: that they conſtantly refer for examples of voyages to *Bourdeaux*, *St. Malo*, and other ſea-ports in *France*; never to the *Thames*, or to any port of *England* or *Ireland*: and that they were made by a Ducheſs and Duke of *Guyenne*, for *Guyenne*, and not for their kingdom of *England*. One of theſe learned writers adds a reaſon, which *he thinks* very concluſive, to prove that theſe laws were of *French* extraction; namely, that, from their firſt appearance, their deciſions have been treated with extreme reſpect in the courts of *France*.

Cleirac Coutumes de la Mer, p. 2. Valin. Emerigon.

Valin.

In theſe days, it is very immaterial whether *France* or *England* is entitled to the honour they reſpectively claim, and I ſhall not tire the reader with any argument upon the point. (*a*)

(*a*) For the arguments in favour of the *Engliſh* claim, the reader may conſult *Selden's Mare Clauſum*, lib. 2. cap. 24. Mr. Juſt. *Blackſtone's* Commentaries, vol. i. page 418. *Schomberg's* Obſervations, page 88.

Anderſon

Vol. i. p. 454.

Anderſon in his hiſtory of commerce has expreſsly ſtated, but he does not adduce any authority in ſupport of his opinion, that the laws of *Oleron* treat of inſurances. I have read them repeatedly with the direct view of diſcovering whether inſurances were of ſo ancient a date: but I have not found a ſingle word which could induce me to ſubſcribe to ſuch an aſſertion. In confirmation of my opinion, *Emerigon*, ſpeaking of theſe laws, has obſerved, "*Il n'y eſt pas dit le mot du contrat d'Aſſurance, qui* "*apparemment n'etoit pas encore alors en uſage.*"

Preface, p. 11.

But while we pay due reſpect and veneration to thoſe maritime regulations, which diſtinguiſhed the Southern and Weſtern parts of *Europe*, it would be improper ſilently to paſs over the laws, which were ordained by an induſtrious and reſpectable body of people, who inhabited the city of *Wiſbuy*, famous for its commerce, and renowned on the ſhores of the *Baltic*. The merchants of this city carried on ſo extenſive a trade, and gave themſelves up ſo entirely to commerce, that they muſt doubtleſs have found a great inconvenience in having no maritime code, to which they could refer to decide their diſputes. To ſuch a cauſe we are probably indebted for thoſe laws and marine ordinances, which bear the name of *Wiſbuy*, which were received by the *Swedes*, at the time they were compoſed, as a juſt and equitable rule of action, and which were long reſpected (and for ought I know, are to this day obſerved) by the *Germans*, *Swedes*, *Danes*, and by all the Northern nations; although the city in which they received their origin, has long dwindled into inſignificancy and contempt.

Cleirac Us et Coutumes de la Mer. Emerigon, Pref.

contempt. At what time theſe laws were compiled is a matter of diſpute; and different writers have adopted different periods, in order to anſwer their own particular ends, or to advance the honour of that age which it happened to be their buſineſs to extol. The writers of the North pretend that *Wiſbuy* was a great commercial city, in the 9th century; from whence they argue, that their laws muſt be of very high antiquity; that they were the model, from which thoſe of *Oleron* were copied, and that they were received and acknowledged by all nations in *Europe*, even to the Straits of *Gibraltar*. Cleirac, 4.

On the other hand it is anſwered, and with much ſtrength of reaſoning, that the Northern code is a tranſcript from that of *Oleron*, although it contains ſeveral additions: for it has been ſhewn, that the laws of *Oleron* were promulgated by *Richard* the Firſt about the cloſe of the twelfth century, at which time, as appears by the report of a *Swediſh* hiſtorian, the city of *Wiſbuy* was not built, nor for near a century afterwards; that the inhabitants were merely ſtrangers collected together from different parts, who, ſo far from having any power or influence over their neighbours, were not abſolute maſters of their own city. Beſides, if their laws had been prior to thoſe of *Oleron*, we ſhould have found in the latter ſome regulations reſpecting inſurances; becauſe a copyiſt never would have omitted ſo material a branch of commercial legiſlation, the laws of *Wiſbuy* having expreſsly mentioned inſurances, and provided, that if the merchant obliged the maſter to inſure the ſhip, the merchant ſhall be obliged to inſure the maſter's life againſt the hazards of the ſea. Olaus Magnus, lib. 10. cap. 16. Art. 66.

rection of their own ſubjects; becauſe they are only binding within their own particular diſtricts: they are very ſimilar to thoſe about which ſo much has been already ſaid; they are all collected by *Magens* in the ſecond volume of his Eſſay on inſurances, and are occaſionally referred to in the courſe of the enſuing work. Beſides, I haſten to give an account of the vaſt improvements, which have been made in this country within theſe laſt thirty years, with reſpect to inſurances, and which are the main object of this enquiry. It would, however, be improper in a work of this nature, entirely to paſs over the *French* nation, the maritime ſtrength of which has of late years conſiderably encreaſed; and whoſe writers upon commercial affairs would reflect honour upon any country.

(*a*) Few people underſtand the theory of commerce better than our neighbours on the Continent; and yet they have not in practice come up to what might have been expected. It is true that *France* from her ſituation, from the bent of her people to certain manufactures, from the happineſs of her ſoil, and her natural advantages, muſt be always poſſeſſed of a great internal and external trade, which muſt add greatly to her wealth, and render her the moſt reſpectable power on the Continent of *Europe*. But the *French* do not naturally poſſeſs that undaunted perſeverance, which is neceſſary for commerce and colonization. It is beſides a great diſadvantage to the commerce of *France*, that

(*a*) It is hardly neceſſary to mention, that theſe obſervations were originally written long before any change had taken place, or been attempted, in the government of *France*.

as

as its government is military, the profeſſion of a merchant is not ſo honourable as in *England*, ſo that the *French* nobility think that it would be beneath them to attend to the drudgery of trade, and that it would degrade their anceſtry to allow any of their ſons to follow the buſineſs of a merchant. The conſequence of this is, that the church, the law, and the army, are ſtocked with the members of noble families; and the counting houſe is by them entirely deſerted. At one period, indeed, there was an appearance that *France* would make as illuſtrious a figure amidſt the powers of *Europe* in trade, as ſhe then did as a warlike nation. The period, to which I allude, was under the adminiſtration of the famous *Colbert*, who, next to *Henry* the Great, may juſtly be ſtiled the father of the *French* commerce and manufactures. This illuſtrious man, who was of *Scotch* extraction, deſcended of a family no way conſiderable by its ſplendour or antiquity, raiſed himſelf by his activity, diligence, and knowledge of commerce, to the firſt offices under the government of *France*. Being appointed to the ſuperintendance of the finances, he propoſed ſuch regulations as brought about the purpoſe he intended, the orderly and frugal management of them; and eſtabliſhed the trade of *France* with the *Eaſt* and *Weſt Indies*, from which ſhe has reaped conſiderable benefits. He alſo patronized and encouraged the liberal arts and ſciences, reformed the courts of juſtice, and introduced many important regulations, which regarded the order of ſociety. But in 1669, when appointed ſecretary of ſtate, and entruſted with the management of affairs relating to the ſea, he had a full opportunity of exerting

Vie de Colbert.

thoſe talents, which he ſo eminently poſſeſſed, and for the exertions of which his name has been tranſmitted with ſo much honour to poſterity. In order to gain a proper inſight into the true effects of commerce upon the various nations of the world, and the advantages of ſome particular branches of trade, he procured and employed learned and diligent men to enquire into the commercial hiſtories of cities long ſince deſtroyed, and the nature of the climate, ſoil, and productions of the countries then riſing into notice. It was to this ſpirit of enquiry in this famous ſtateſman, that the world is indebted, as appears from the dedication, for that very maſterly performance upon the commerce and navigation of the ancients, written by *Huet* biſhop of *Avranches* and *Soiſſons*, who is juſtly entitled to a high rank among men of letters. *Colbert* having thus made uſe of the labours of others in order to gain uſeful information, undertook to reſtore the navy and commerce of *France*; and he completed all his ſervices by the publication of that excellent body of Sea laws, known by the name of the Ordinances of *Lewis* the 14th, which comprehend every thing relating to naval or commercial juriſprudence; and of which the doctrine of inſurances forms a conſiderable part. To its merits all *Europe* has borne teſtimony; and the name of *Colbert* muſt ever be mentioned with reſpect, when the ordinances of *Lewis* the 14th are the ſubject of converſation. (*a*)

Huèt Hiſt. du Commerce et de la Navigation des Anciens, pref.

Vie de Colbert.

L'Honneur Francois, tom. 7, p. 302.

Theſe

(*a*) It was under the adminiſtration of *Colbert*, that the *French* laid the foundation of *Quebec* on the banks of the river *St. Lawrence*; and he performed a work, which, ſays a *French* hiſtorian

L'Honneur Francois, par M. de Sacy, tom. 7. p. 302.

These ordinances have had the good fortune to meet with a laborious commentator in *Valin*, who, being thoroughly ſenſible of the advantages which his country muſt neceſſarily derive from ſuch an excellent code, has, with a degree of labour and induſtry which excite our admiration, and which are highly deſerving of imitation, placed it in the moſt favourable point of view, has cleared up every obſcurity, by tracing theſe laws to their ancient ſources, and by a full inveſtigation of old ordinances, and the deciſions of former tribunals, has added much to the maſs of learning upon ſubjects of this nature. But of all the ſources, from which modern *French* legiſlators could derive the moſt eſſential information, the famous treatiſe called "*Le Guidon*" was the chief. This tract was republiſhed by *Cleirac*, who pays a due compliment to its merits, in his work upon the Uſages and Cuſtoms of the Sea: and although in its ſtyle and manner it certainly ſavours of the ruſt of antiquity; yet it contains the true principles of naval juriſprudence. If the ſtyle be antiquated, and the text be corrupted in ſome places, yet the treatiſe is ſtill valuable by the wiſdom, which ſhines through the whole, and the number of deciſions, which it contains.

Cleirac, p. 218.

Upon this occaſion let me not forget to take proper notice of two very modern and diſtinguiſhed

rian, even in the eyes of *Richelieu*, ſeemed to ſurpaſs human power; and that it was to effect a junction between the *Atlantic* and the *Mediterranean* by means of a canal, the execution of which attracted the admiration of *Europe*, and added much to the ſplendour of *French* commerce.

French writers, M. *Pothier* and M. *Emerigon*. The former of theſe has written admirable diſſertations upon every ſpecies of expreſs and implied contracts, and amongſt the reſt upon that of inſurance; he has conſidered his various ſubjects with ſo much clearneſs, and perſpicuity, and has produced ſo many appoſite examples in ſupport of the poſitions he advances, that they greatly contribute to the advancement of the knowledge of this branch of juriſprudence. His ſtyle is at the ſame time manly, neat, and claſſical; and well ſuited to didactic diſcourſes.

Pothier, 3 tom. duod. p. 1.

M. *Emerigon* has, in his work, confined himſelf to the conſideration of marine inſurances, and to the contract of bottomry only. This being the caſe, he has gone into thoſe ſubjects much more at length than any former *French* writer; and has, with infinite labour, unwearied ſtudy and reflection, collected the deciſions and authorities, applicable to the purpoſe of his work. This learned foreigner, I underſtand, holds a diſtinguiſhed rank among the advocates of his own country: and his treatiſe upon inſurances will by no means diminiſh his fame.

Traité des Aſſurances.

We have ſeen, that the naval reputation of the *Engliſh* was arrived at a great height in the twelfth century, for the laws of *Oleron*, of the merits of which much has been ſaid, were at that time compiled by an *Engliſh* monarch, and received here as the regulator of naval affairs. The progreſs of commerce, however, in this country, was not anſwerable to ſo auſpicious a beginning; for in the reign

reign of *Edward* the Third, upwards of a century afterwards, commerce and induſtry were at a very low ebb. That monarch, ſtruck with the flouriſhing ſtate of the Northern provinces, which have been already deſcribed, and perceiving the true cauſe of their proſperity, endeavoured to excite a ſpirit of induſtry among his ſubjects, who ſeemed to be blind to the advantages of the ſituation, and ignorant of thoſe ſources, from which they might derive wealth and opulence. So far were they lulled by ignorance and indolence, that they did not even attempt thoſe manufactures, the materials of which they themſelves ſupplied to foreigners. Notwithſtanding the endeavours of *Edward*, and the many wiſe eſtabliſhments propoſed and encouraged by him, it was not till the reign of *Elizabeth*, that the *Engliſh* began to diſcover their true intereſts, and the arts by which they were to obtain that pre-eminence and rank, which they now hold among commercial nations. This ſlow progreſs of commerce in this country may be accounted for on various grounds. During the *Saxon* heptarchy, *England* was ſplit into many kingdoms, perpetually at variance with each other; it was expoſed to the fierce incurſions of the Northern pirates; it was ſunk in barbarity and ignorance; and conſequently was in no condition to cultivate commerce, or to purſue any ſyſtem of wiſe or uſeful policy. To this ſucceeded the *Norman* conqueſt, and all the conſequences of a feudal government, military in its nature, hoſtile to commerce, and the arts and refinements of a liberal and civilized people. Scarce had the nation recovered from the ſhock occaſioned by this revolution, when it was engaged in ſupporting

Hume's Hiſt. of Eng. oct. edit. vol. ii. p. 494.

Robertſon's View of Society, &c.

porting its monarch's pretenſions to the *French* crown, and it long continued to waſte its vigour and wealth in wild endeavours to conquer that country. To this we may add the deſtructive civil wars between the houſes of *York* and *Lancaſter*, which long deluged the kingdom with blood; and to which a period was at laſt happily put by the union of their ſeveral titles to the crown, in the perſon of *Henry* the Eighth. The reformation then took place under that monarch, and it was not till the reign of *Elizabeth*, that the feuds and diſſenſions which ſuch an important event was likely to occaſion, began to ſubſide. During her long reign, and her wiſe and prudent adminiſtration of government, commerce began to rear its head, and found ſhelter and protection from the managers of public affairs. From this ſhort ſketch, it is not much to be wondered at, that *England* was one of the laſt nations of *Europe*, which availed herſelf of her great commercial advantages: but ſhe has ſince made ample amends for her long continued indolence and inactivity, by the amazing extent of her commerce, and the wiſe laws and regulations to be found in her ſyſtem of maritime juriſprudence.

While commerce continued in this weak and languid ſtate, it cannot be ſuppoſed that inſurances, which ſpring from commerce, were at all encouraged or underſtood. It is true, the *Lombards* came into *England* in the 13th century, and it is univerſally agreed, that whatever may have been the origin of inſurances, they were introduced into *England* by that active and induſtrious people. This idea is countenanced and confirmed by the clauſe to this

1 Anderſon's Hiſt. of Com.

Vide the Appendix, No. 1,

this day inſerted in all policies of inſurance "that "this writing or policy of aſſurance ſhall be of as "much force and effect as any writing heretofore "made in *Lombard Street*, &c." the place where theſe *Italians* are known to have taken up their reſidence, and carried on their trade. The preamble to the ſtatute of Queen *Elizabeth*, which will be preſently mentioned, ſpeaks of inſurances, as having exiſted time out of mind in this kingdom. Be this as it may, it is certain that prior to the reign of that princeſs very few inſurances had been effected: or, if effected, no queſtion had ever ariſen upon them in any of the ſuperior courts. So little were the judges acquainted with the nature of the contract, that ſo late as the 30 and 31ſt of *Elizabeth*'s reign, it became a queſtion where an action upon a policy of inſurance ſhould be tried, the policy having been effected in *London*, and the ſhip detained in the river *Soane* in *France*. The policy was on a ſhip from *Melcombe Regis*, in the county of *Dorſet*, to *Abbeville* in *France*. The plaintiff declared, that the ſhip, in ſailing towards *Abbeville*, *to wit*, in the river of *Soane*, was arreſted by the king of *France*. The parties came to iſſue upon the queſtion, whether the ſhip was ſo arreſted or not: and it was tried before Lord Chief Juſtice *Wray*, in the city of *London*; and a verdict was found for the plaintiff. In arreſt of judgment it was moved, that this iſſue ariſing merely from a place *out of the realm*, could not be tried in *London*. But it was reſolved by the court, that this iſſue ſhould be tried where the action was in this caſe brought; for the promiſe, which is the ground and foundation of the action, was made in *London*; and the arreſt now in iſſue,

6 Coke Rep. 47 b.

iſſue, is not the ground of the action which is founded on the *aſſumpſit*, and the arreſt is the breach of the *aſſumpſit*.

This is the moſt ancient caſe I have been able to find upon the ſubject of inſurances; and I thought proper to inſert it here, as the beſt proof, that, prior to the reign of *Elizabeth*, this contract could have been very little, if at all known. We have ſeen, however, that under *Elizabeth*, the genius of *England* began to diſplay itſelf: about which time alſo, the legiſlature began to think the regulation of matters of aſſurance an object well worthy their moſt ſerious attention; and it cannot but afford us much pleaſure to find, that even in that early age, the true principles, upon which this ſpecies of contract is founded, and upon which it ought to be protected and encouraged in a commercial nation, were clearly and fully underſtood. In the preamble to an act of parliament, paſſed in the 43d year of the reign of Queen *Elizabeth*, "*concerning matters of aſſurance uſed amongſt merchants*," the ſenſe of the legiſlature upon the ſubject is expreſſed with clearneſs and perſpicuity. After reciting, that it has ever been the policy of this nation to encourage trade, and that policies of aſſurance have exiſted time out of mind, it goes on to ſtate the advantages to be derived from their encouragement in a commercial nation. "By means of "which policies of aſſurance, it cometh to paſs "upon the loſs or periſhing of any ſhip, there "followeth not the undoing of any man, but the "loſs lighteth rather eaſily upon many, than heavy "upon few, and rather upon them that adventure "not,

43 Eliz. ch. 12.

" not, than upon thoſe who do adventure, where-
" by all merchants, eſpecially thoſe of the younger
" ſort, are allured to venture more willingly, and
" more freely."

The purpoſe of that ſtatute was, to erect a particular court for the trial of cauſes, relative to policies of inſurance, in a ſummary way; and to that end the ſtatute ordained, that a commiſſion ſhould iſſue yearly, directed to the Judge of the *Admiralty*, the Recorder of *London*, two doctors of the civil law, two common lawyers, and eight merchants, empowering any five of them to hear and determine all ſuch cauſes, ariſing in *London*; and it alſo gave an appeal from their deciſion, by way of bill, to the court of Chancery. But this ſtatute not entirely anſwering the intention of the legiſlature, ſome further regulations were made by a ſubſequent ſtatute: ſuch as the reduction of the number neceſſary to conſtitute a quorum. I forbear entering at length into this matter, the court erected by theſe ſtatutes being now entirely diſuſed. The reaſons of this may be collected from ſome few deciſions in our reporters: but one appears on the face of the ſtatute itſelf; namely, that its juriſdiction was not ſufficiently extenſive, being confined to ſuch cauſes only *as aroſe in London*.

13 and 14 Car. 2. ch. 23.

By a caſe reported in *Style* we find, that a prohibition iſſued to the court of Policies of Inſurance, to prevent it from proceeding in a caſe of inſurance upon a life, the Court of King's Bench being of opinion, that the ſtatute only meant to give the court

Bendir v. Oyle, Style, 166.

court below cognizance of *ſuch contracts* only as related to *merchandize*.

Dalbie v. Proudfoot, 1 Shower, 396.

In another caſe it ſeemed to be the opinion of the Court of King's Bench, that the juriſdiction of this newly erected court did not extend to ſuits brought by the aſſurer againſt the aſſured; but only to ſuch as were proſecuted by the latter againſt the former. It is true, in Sir *Bartholomew Shower's* note of the caſe, no deciſion appears to have been made; but a rule to ſhew cauſe why a prohibition ſhould not iſſue was obtained; and no notice is afterwards taken of it, although the learned reporter was himſelf the counſel in the cauſe, who had obtained the original rule.

Came v. Moy, 2 Siderfin, 121.

But a caſe reported in *Siderfin*, ſeems to have ſtruck a more ſevere blow at the exiſtence of this court than any of thoſe caſes I have mentioned; for it was there held, that it was no bar to an action upon a Policy of Inſurance at the common law to ſay, that the plaintiff had ſued the defendant for the ſame cauſe in the court erected by the ſtatute of *Elizabeth*, and that his ſuit was there diſmiſſed.

Lex Merc. Red. 4th edit. p. 292.

Theſe cauſes co-operating, together probably with ſome inſtances of partiality in the judges, this court fell into diſuſe, no commiſſion having iſſued for many years; but inſurance cauſes are now decided, like all other queſtions of property, and by that mode of trial moſt agreeable to the nature of our conſtitution, by a trial in a court of common law.

It has been much the faſhion of late years to inſiſt upon the advantages which the trading part of the nation would derive from the eſtabliſhment of ſome equitable and amicable judicatory for the trial of all diſputed points in matters of inſurance. This is only another proof of the weakneſs and fallibility of the human mind, which is never ſatisfied with the enjoyments within its reach, however excellent they may be; but pants after thoſe of foreign growth. Thus, a people, who are poſſeſſed of a ſpecies of trial, the beſt calculated for the diſcovery of truth, and the advancement of juſtice, and which has excited the admiration of the world, are deſirous of parting with ſuch an advantage for a mode of trial, which is very unſatisfactory.

The court erected by the ſtatute of *Elizabeth*, and which has now fallen into diſuſe, is perhaps one of the ſtrongeſt arguments, that can be adduced to prove, that ſuch a judicature is not congenial to the ſpirit and diſpoſition of *Britons*, nor well adapted for the purpoſes of its inſtitution. It is univerſally agreed by all writers upon juriſprudence, that nothing tends ſo much to the elucidation of truth, and the detection of fraud, as the open *viva voce* examination of witneſſes, in the preſence of all mankind; before judges, who, from their knowledge of books and men, acquired by long ſtudy and experience, are well qualified to diſcriminate and decide between right and wrong; and before twelve upright citizens, who have an opportunity of obſerving the appearance, countenance, inclination, and deportment of thoſe

thoſe who are thus examined upon oath. Beſides the ſubjects of thoſe ſtates, which have eſtabliſhed theſe equitable tribunals, ſenſible of the ſuperior advantages of the *Engliſh* inſtitution, feeling that, in great mercantile queſtions, the greateſt attention is paid to the eternal and immutable principles of reaſon, and that all men, whether natives or foreigners, here meet with an equal meaſure in the adminiſtration of juſtice, fly to this country to make their contracts of inſurance, that, in caſe of a diſpute, they may have the benefit of its laws. Did it fall within the compaſs of this enquiry, I could relate many caſes, of the truth of which I have not the ſmalleſt reaſon to doubt, which would ſerve to ſhew the idea entertained by foreigners of our mercantile juriſprudence, and the high repute and eſtimation in which our judges are juſtly held by the *European* nations.

But though the court of Policies of Aſſurance has been long diſuſed; though it is near a century ſince queſtions of this nature became chiefly the ſubject of common law juriſdiction; yet, I am ſure I rather go beyond bounds, if I aſſert that in all our reporters from the reign of Queen *Elizabeth*, to the year 1756, when Lord *Mansfield* became Chief Juſtice of the King's Bench, there are 60 caſes upon matters of inſurance. Even thoſe caſes, which are reported, are ſuch looſe notes, moſtly of trials at *Niſi Prius*, containing a ſhort opinion of a ſingle judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the ſubject. From hence it muſt neceſſarily follow, that as there have been but few poſitive

poſitive regulations upon inſurances, the principles, on which they were founded, could never have been widely diffuſed, nor very generally known.

This was owing to ſome defects, which were diſcoverable in the proceedings in our courts, and in the delays and expences which ſuitors experienced; ſo that they rather choſe to ſubmit to their firſt loſs, than be haraſſed by the delays of the law, or be at the expence of trying a queſtion, of which the deciſion might perhaps be of leſs moment to the individual than to the public. Theſe defects were ſo glaring, that it was one of the firſt acts of Lord *Mansfield*'s adminiſtration to apply a remedy; and his labours have been happily attended with ſuch ſucceſs, that they have been of eſſential ſervice to the nation in general, conſidered in a commercial light, and have excited the applauſe and approbation of *Europe*.

Before the time of this venerable judge, the legal proceedings, even on contracts of inſurance, were ſubject to great vexations and oppreſſions. If the underwriters refuſed payment, it was uſual for the inſured to bring a ſeparate action againſt each of the underwriters on the policy, and to proceed to trial on all. The multiplicity of trials was oppreſſive both to the inſurers and inſured; and the inſurers, if they had any real point to try, were put to an enormous expence, before they could obtain any deciſion of the queſtion which they wiſhed to agitate. Some underwriters, who thought they had

 a found

a ſound defence, and who were deſirous of avoiding unneceſſary coſts or delay to themſelves or the inſured, applied to the court of King's Bench to ſtay the proceedings in all the actions but one, undertaking to pay the amount of their ſubſcriptions with coſts, if the plaintiff ſhould ſucceed in the cauſe which was tried; and offering to admit on their part every thing, which might bring the true merits of the caſe before the court and jury. Reaſonable as this offer was, the plaintiff, either from perverſeneſs of diſpoſition, or the illiberality and cunning of his adviſers, refuſed his conſent to the application. The court did not think themſelves warranted to make ſuch a rule without his conſent; but Mr. Juſtice *Deniſon* intimated that if the plaintiff perſiſted, againſt his own intereſt, in his right to try all the cauſes, the court had the power of granting imparlances in all but one, till there was an opportunity of trying that one action. Lord *Mansfield* then ſtated the great advantages reſulting to each party by conſenting to the application which was made; and added, that if the plaintiff conſented to ſuch a rule, the defendant ſhould undertake not to file any bill in equity for delay, nor to bring a writ of error (*a*), and ſhould produce all books and papers, that were material to the point in iſſue. This rule was afterwards conſented to by the plaintiff, and was found ſo beneficial to all parties, that it is now grown into general uſe;

2 Barnard. B. R. 103.

(*a*) The Court of Common Pleas were unanimouſly of opinion, after conſideration, that a defendant who had entered into the conſolidation rule, could not bring a writ of error at all, although there be manifeſt error upon the record. *Camden* v. *Edie*, 1 H. Blac. Rep. 21.

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and is called The Conſolidation Rule. Thus on the one hand, defendants may have queſtions of real importance tried at a ſmall expence; and plaintiffs are not delayed in their ſuits by thoſe arts, which have too frequently been reſorted to, in order to evade the payment of a juſt demand.

In former times, the whole of the caſe was left generally to the jury, without any minute ſtatement from the bench of the principles of law, on which inſurances were eſtabliſhed; and as the verdicts were general, it is almoſt impoſſible to determine from the reports we now ſee, upon what grounds the caſe was decided. Nay, even if a doubt aroſe in point of law, and a caſe was reſerved upon that doubt, it was afterwards argued in private at the chambers of the judge who tried the cauſe, and by his ſingle deciſion the parties were bound. Thus, whatever his opinion might be, it never was promulgated to the world; and could never be the rule of deciſion in any future caſe.

Lord *Mansfield* introduced a different mode of proceeding; for in his ſtatement of the caſe to the jury, he enlarged upon the rules and principles of law, as applicable to that caſe; and left it to them to make the application of thoſe principles to the facts in evidence before them. So that if a general verdict were given, the grounds, on which the jury proceeded, might be more eaſily aſcertained. Beſides, if any real difficulty occurred in point of law, his Lordſhip adviſed the counſel to conſent to a ſpecial caſe. In a ſpecial caſe, the facts are either

admitted by the parties, or if they are diſputed, are proved; and then the judge takes the opinion of the jury upon thoſe facts, reſerving the queſtion of law to be agitated elſewhere. Theſe caſes are afterwards argued, not before the judge in private, but in open court before all the judges of the bench from which the record comes. Thus nice and important queſtions are now not haſtily and unadviſedly decided; but the parties have their caſe ſeriouſly conſidered and debated by the whole court; the deciſion becomes notorious to the world; it is recorded for a precedent of law ariſing from the facts found, and ſerves as a rule to guide the opinions of future judges.

It had alſo been the cuſtom, when caſes were reſerved, to leave it to the counſel on both ſides to draw them up at their leiſure. This introduced conſiderable delays; for every fact became again a ſubject of diſpute; and frequently from the hurry of buſineſs and other avocations of the counſel, the caſe was neglected for a conſiderable time, before it was ready for the inſpection of the court.

Now, whenever, a caſe is reſerved, the judge himſelf dictates to the clerk of the court the facts which ought to be ſtated, and the queſtion upon which the opinion of the court is required: and in addition to this, Lord *Mansfield*, whoſe rules are now the ſubject of our enquiry, ordered, that all caſes ſo reſerved muſt be ſet down for argument within the firſt four days of the term following the trial; otherwiſe the judgment muſt be entered according to the finding of the jury.

One additional improvement in the proceedings remains to be mentioned. Before Lord *Mansfield*'s time, it was almoſt a matter of courſe not to decide any caſe, without hearing two arguments upon it: but in the very firſt cauſe, which is reported of his Lordſhip's deciſions, he expreſſed himſelf to this effect: "Where we have no doubt, we ought not to "put the parties to the delay and expence of a far- "ther argument, nor leave other perſons who may "be intereſted in the determination of a point of "a general nature, unneceſſarily under the anxiety "of ſuſpence." When we add to theſe wiſe regulations the conſideration that Lord *Mansfield*, during his long adminiſtration of juſtice, gave up a great part of his time, and employed his talents in the elucidation of thoſe points, which tend to fix the ſyſtem of mercantile juriſprudence upon the ſureſt grounds, we need not wonder that that part of it, which relates to marine inſurances, has attained to its preſent ſtate of perfection.

Raynard v. Chaſe, 1 Burrow 5.

A complete ſyſtem of juriſprudence cannot be ſuddenly erected: but there is rather matter to excite our wonder that ſo much has been done in this reſpect within the laſt 40 years, than ground to complain that little has been effected. It is the boaſt of this age, that in it the great foundations of marine juriſprudence have been laid, by clearly developing the principles on which policies of inſurance are founded, and by happily applying thoſe principles to particular caſes. It will be the buſineſs of the following work, which profeſſes to lay down a ſyſtem of the law as it now ſtands, to point out, amongſt other things, the improvements which

have been made by the legiſlature from time to time on the ſyſtem of inſurances, by many wiſe ſtatutes and ſalutary reſtrictions; and to prove, that the learned judges of the courts both of law and equity, by their liberal and equitable conſtruction of thoſe ſtatutes, and by adopting the true principles of commerce in their deciſion of the many intricate caſes, which have been brought before them, have added another pillar to that beautiful ſtructure of rational juriſprudence, which has deſervedly acquired the admiration of mankind.

CHAPTER THE FIRST.

OF THE POLICY.

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POLICY is the name given to the inſtrument, by which the contract of indemnity is effected between the inſurer and inſured; and it is not, like moſt contracts, ſigned by both parties, but only by the inſurer, who on that account, it is ſuppoſed, is denominated an underwriter. Notwithſtanding this, there are certain conditions, of which we ſhall hereafter have occaſion to ſpeak, to be performed as well by the perſon not ſubſcribing, as by the underwriter, otherwiſe the policy will be void. Of policies there ſeem to be two kinds, *valued* and *open* policies; and the only difference between them is this, that in the former, goods or property inſured are valued at prime coſt at the time of effecting the policy; in the latter, the value is not mentioned: that in the caſe of an open policy, the real value muſt be proved; *in a* valued policy it *is agreed*, and is juſt as if the parties had admitted it at the trial.

2 Burr 1117.

Although policies of aſſurance are not to be ranked with ſpecialty contracts, not being under ſeal, yet they have always been held as ſacred agreements, and of the firſt credit: ſo much ſo, that when once they are underwritten, they cannot be altered by either party; becauſe it would open a door to an infinite variety of frauds, and introduce uncertainty into a ſpecies of contract, of which certainty and preciſion are the moſt eſſential requiſites.

Skinn. 54.

In a caſe before Lord Chancellor *Hardwicke*, this doctrine was admitted in its full extent. The plaintiff had inſured a ſhip at and from *London* to *Oſtend*, from thence to *Rotterdam*, and from thence to the *Canaries*, warranted an *Oſtend* ſhip, which ſhip was afterwards taken. The bill was brought to have the policy rectified, for that the intention of the parties was miſtaken therein, which was, that the warranty was too general,

Henkle v. The Royal Exch. Aſſur. Company, 1 Vez. 317.

CHAP. I. and that the voyage ſhould have been ſtated to take place from *Oſtend* only, and not from *London*. The evidence in this caſe was the depoſition of *Knox*, the agent for the company; who depoſed, that the plaintiff applied to him to inſure the ſhip, and that he believed the plaintiff told him, ſhe was, or had been an *Engliſh* ſhip, and might ſay ſomething concerning the manner or intent of making her an *Oſtend* ſhip; but that his anſwer was, that he would not enter into the manner, but that if the plaintiff would warrant her to be an *Oſtend* ſhip, he would inſure; and that on thoſe terms, and no other, the agreement was made. There was the evidence of another perſon, who varied from *Knox*; in addition to which it was ſaid, there was the evidence ariſing from circumſtances, for that it was impoſſible for the plaintiff to intend to inſure her as an *Oſtend* ſhip, ſhe being then in *London*, and could not be an *Oſtend* ſhip without going to *Oſtend*; for which proof was read that it was neceſſary ſhe ſhould be regiſtered.

Lord *Chancellor*.—"The firſt queſtion is, whether it ſufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement. It is certain, that to come at that, there ought to be the ſtrongeſt proof poſſible, for the agreement is twice reduced into writing in the ſame words, and muſt have the ſame conſtruction: and yet the plaintiff ſeeks, contrary to both theſe, to vary them, and that in a caſe, where his witneſſes vary from each other. The ſingle depoſition, upon which it depends, is very uncertain; and imports, that they relied on the plaintiff's warranty, leaving the tranſaction relating to the manner of making her an *Oſtend* ſhip entirely to himſelf. His Lordſhip, therefore, as there was no evidence to vary the contract from the written words, ordered the bill to be diſmiſſed."

At the ſame time it muſt be obſerved, that caſes frequently may, and do exiſt, in which a policy, upon proper evidence, may be altered, without any violation of the principles above laid down, and which has been often done by the courts both of law and equity; for let it be remembered once for all, that

that in queſtions of inſurance, which is a contract founded upon broad equitable principles, courts of common law are bound by the ſame rules of deciſion as courts of equity. After ſigning, policies are likewiſe frequently altered by *conſent* of the parties, and ſuch policies are good, agreeably to the maxim, *conſenſus tollit errorem.*

An inſtance of the former kind of alteration of a policy occurs in the chancellorſhip of Lord *Hardwicke*, to whoſe deciſion we laſt referred. The inſurance was upon the ſhip five hundred pounds, and the policy ſtated, that the adventure was to commence immediately *from the departure of the ſhip from Fort St. George to London.* The bill was brought by the plaintiff, ſuggeſting that the owner had employed a Mr. *Halhead* to inſure the ſhip with the defendants, to commence *from her arrival at Fort St. George*; that a label, agreeable to thoſe inſtructions, with all the particulars of the agreement, had been entered in a book, and ſubſcribed by *Halhead*, and two of the directors of the company; that by *a miſtake* the policy was made out different from the label; that the ſhip being loſt in the Bay of *Bengal*, *after* her arrival at *Fort Saint George*, but *before* her departure for *England*, the company refuſe to pay; upon theſe ſuggeſtions, the plaintiff prayed that the miſtake might be rectified, and that the company might be ordered to pay five hundred pounds with intereſt.

Motteux v. the Gov. and Comp. of the London Aſſurance, 1 Atkyns 545.

His Lordſhip was of opinion, that the label was a memorandum of the agreement, in which the material parts of the policy were inſerted; that although the policy was ambiguous, the label made it clear; and as it was only a miſtake of the clerk, it ought to be rectified according to the label.

In an action upon a policy of inſurance, and *non aſſumpſit* pleaded, the facts were, that *Stubbs*, a broker, had inſtructions to procure an inſurance on goods on board the *Mary Galley*, *of Saint Chriſtophers*, *Captain A. Hill*, *commander*: that *Stubbs*, in writing the policy, by miſtake, made the inſurance on the *Mary*, *Captain Haſlewood*, *commander*, which was ſubſcribed by the defendant: that the *Mary Galley* was loſt, and then *Stubbs* applied to the inſurers to conſent to alter the policy, to which they agreed. It was urged, that on account of the alteration,

Bates v. Grabham, Salk. 444.

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alteration, the defendant ſhould have an increaſe of premium, the ſhip *Mary* being ſtouter than the *Mary Galley*. But *Holt*, chief juſtice, ruled, that the action well lay upon the policy, and that the miſtake might be ſet right.

A policy of inſurance, when effected, becomes the property of the inſured: and if it be *wrongfully* withheld, either by the broker employed by him to effect it, or by any other perſon to whoſe hands it may happen to come, he may maintain an action of trover for it, as well as for any other ſpecies of property.

Harding v. Carter and another, Sittings at Guildhall, Eaſter Vacation, 1781.

Thus an action of trover was brought againſt the defendants for two policies of inſurance. The defendants were brokers, who had written to the plaintiff, the maſter of a veſſel, that they had got two policies effected; the one on account of the plaintiff's cloaths and wages, the other on account of the owners, and that the underwriter was Mr. *Newnham*. A loſs having happened, the defendants produced a policy, underwritten by one *J. S.* only inſuring the ſhip, in which the plaintiff had no intereſt.

Lord *Mansfield*.—"I ſhall conſider the defendants as the actual inſurers, and therefore the plaintiff muſt prove his intereſt and loſs. The defence ſet up was, that the letter above ſtated in evidence was written by the defendant's clerk through miſtake; and it was ſaid, that trover could not be maintained for that which never exiſted: but his Lordſhip would not ſuffer the defendants now to contradict their own repreſentation; and the plaintiff accordingly had a verdict to the amount of his intereſt, the premium being deducted."

It is material to obſerve, that policies of inſurance, though called *written* inſtruments, are, for the convenience of trade, and the diſpatch of buſineſs, generally printed, leaving blanks for the inſertion of names and all other requiſites. This being the caſe, it is frequently neceſſary to inſert written clauſes, in order to expreſs the meaning of the parties to the contract, which, from ſome particular circumſtances, the printed form may not ſufficiently explain. Theſe written clauſes and conditions, thus inſerted, are to be conſidered as

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the real contract; the court will look to them to find out the intention of the parties, and will conſequently ſuffer ſuch conditions to controul the printed words in policies of inſurance.

Having premiſed thus much of policies in general, it may be proper to conſider this ſubject in a threefold point of view: Firſt, what perſons may be inſurers; Secondly, what things may be inſured; Thirdly, what the requiſites of a policy are.

1ſt. What perſons may be inſurers. It ſhould ſeem, that by the common law and uſage of merchants, any perſon whatever might be an inſurer, however unable he might be, from poverty to make up the loſſes inſured againſt, provided the merchant was weak enough to truſt to ſuch a ſecurity. In proceſs of time, however, there were ſo many who made a ſhew of great wealth, in order to deceive the honeſt and unſuſpicious trader out of his premiums, and who were in inſolvent circumſtances, that it became an object of national concern, and parliamentary interference. The miſchiefs then exiſting in this branch of trade, and the dangerous conſequences thence ariſing to the intereſt of the country, are to be collected from the preamble of the ſtatute, which paſſed in the reign of *George* the Firſt, to remedy theſe evils, and which has in ſome, though not in any great degree, reſtrained the rule of the common law as to the unlimited right any man or body of men had to become inſurers. 6 Geo. I. c. 18. "Whereas "it has been found by experience, that many particular per- "ſons, after they have received large premiums or conſider- "ation monies for or towards the inſuring of ſhips, goods, "and merchandizes at ſea, have become bankrupts, or other- "wiſe failed in anſwering or complying with their policies "of aſſurance, whereby they were particularly engaged to "make good, or contribute towards the loſſes which mer- "chants and traders have ſuſtained, to the ruin and im- "poveriſhment of many merchants and traders, and to the "diſcouragement of adventurers at ſea, and to the great dimi- "nution of the trade, wealth, ſtrength, and publick revenues "of the kingdom: And whereas it is conceived, that if two "ſeveral and diſtinct corporations, with a competent joint

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"ſtock to each of them belonging, and under proper conditions, reſtrictions, and regulations, were erected and eſtabliſhed for aſſurance of ſhips, goods, or merchandizes at ſea, or going to ſea, (excluſive of all or any other corporations or bodies politick already created, or hereafter to be created, and likewiſe excluſive of ſuch ſocieties or partnerſhips as now are, or may hereafter be entered into for that purpoſe), ſeveral merchants or traders, who adventure their eſtates, or part of their eſtates, in ſuch ſhips, goods, and merchandizes, at ſea, or going to ſea, (eſpecially in remote or hazardous voyages), would think it much ſafer for them to depend upon the policies or aſſurances of either of thoſe two corporations, ſo to be erected and eſtabliſhed, than on the policies or aſſurances of private or particular perſons." The ſtatute then goes on to authorize his majeſty to grant charters to two diſtinct companies or corporations, for the inſurance of ſhips, goods, and merchandizes, at ſea, or going to ſea, and for lending money on bottomree. The ſtatute alſo enacts that the corporations may purchaſe lands to the amount of one thouſand pounds *per annum*, may have a common ſeal, and may be capable to ſue and be ſued at law; that each corporation ſhall provide a ſufficient ſtock of ready money to ſatisfy and diſcharge all juſt demands, ariſing upon their policies of inſurance; and in caſe of refuſal, the parties inſured may bring their action againſt the corporation, and ſhall recover *double* damages and coſts. This clauſe, however, giving double damages, was afterwards thought by the legiſlature to be hard and oppreſſive; and therefore, by a clauſe in a ſubſequent ſtatute, theſe corporations were allowed to plead the general iſſue to any action brought againſt them; and the jury, in eſtimating the damages, as well with reſpect to them as any other perſons, were left to their own diſcretion.

8 Geo. I. c. 15. ſ. 25.

11 Geo. I. c. 30. ſ. 43.

Vide poſt, c. 20.

After ſeveral other clauſes for the internal regulation of theſe corporations, the ſtatute of the ſixth of *Geo.* the Firſt goes on to prohibit any other ſociety or partnerſhip whatſoever from making inſurances, or lending money on bottomree. "And be it enacted, that, from and after the granting or making the ſaid charters or indentures for erecting the two corporations before mentioned, and paſſing the ſame un-

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" der the great ſeal, for and during the continuance of the ſaid
" corporations reſpectively, or either of them, all other cor-
" porations or bodies politick, before this time erected or eſta-
" bliſhed, or hereafter to be erected or eſtabliſhed, whether
" ſuch corporations or bodies politick, or any of them, be ſole
" or aggregate, and all ſuch ſocieties and partnerſhips as now
" are, or hereafter ſhall or may be, entered into by any perſon
" or perſons, for aſſuring ſhips or merchandizes at ſea, or for
" lending money on bottomree, ſhall, by force and virtue of
" this act, be reſtrained from granting, ſigning, or under-
" writing any policy of aſſurance, or making any contracts
" for aſſurance of or upon any ſhip or ſhips, goods, or mer-
" chandizes, at ſea, or going to ſea, and for lending any
" monies by way of bottomree as aforeſaid: and if any cor-
" poration or body politick, or perſons acting in ſuch ſociety
" or partnerſhip (other than the two corporations intended
" to be eſtabliſhed by this act, or one of them) ſhall preſume
" to grant, ſign, or underwrite, after the twenty-fourth day
" of *June* 1720, any ſuch policy or policies, or make any
" ſuch contract or contracts for aſſurance of or upon any
" ſhip or ſhips, goods or merchandizes, at ſea or going to
" ſea, or take or agree to take any premium or other reward
" for ſuch policy or policies, every ſuch policy and policies
" of aſſurance of or upon any ſuch ſhip or ſhips, goods or
" merchandizes, ſhall be *ipſo facto* void, and all and every
" ſuch ſum or ſums ſo ſigned and underwritten in ſuch
" policy or policies ſhall be forfeited, and ſhall and may be
" recovered, one half to the uſe of his majeſty, the other
" to that of the informer, by action: and if any corporation
" or bodies politick, or perſons acting in ſuch ſociety or
" partnerſhip, other than the two corporations intended to
" be erected by this act, or one of them, ſhall preſume to
" lend, or agree to lend, or advance, by themſelves or any
" others on their behalf, after the ſaid twenty-fourth day of
" *June* 1720, any money by way of bottomree contrary to
" this act, the bond or other ſecurity for the ſame ſhall be
" *ipſo facto* void, and ſuch agreement ſhall be adjudged to
" be an uſurious contract, and the offenders therein ſhall
" ſuffer as in caſes of uſury: nevertheleſs it is intended and
" hereby declared, that any private or particular perſon or
" perſons

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"perſons ſhall be at liberty to write or underwrite any "policies, or engage himſelf or herſelf in any aſſurances of, "for, or upon any ſhip or ſhips, goods or merchandizes at "ſea, or going to ſea, or may lend money by way of bot-"tomree, as fully and beneficially, as if this act had never "been made, ſo as the ſame be not on the account or riſque "of a corporation or body politick, or upon the account or "riſque of perſons acting in a ſociety or partnerſhip for that "purpoſe aforeſaid."

Sullivan v. Greaves, Sittings after Eaſter 1789.

Upon this clauſe of the ſtatute, a queſtion aroſe at *Guild-hall*. It was an action brought againſt the defendant to recover a ſum of money received by him from one *Briſtow* to the plaintiff's uſe. The plaintiff was an underwriter, and the defendant was a broker; and a loſs having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but *Briſtow*, having agreed to take half the plaintiff's riſk, had paid his moiety of the loſs into the hands of the defendant, to recover it from whom this action was brought.

Lord *Kenyon*, C. J.—"I am of opinion that the plaintiff cannot recover; for this is clearly a partnerſhip within the act of parliament. If a ſingle name appears upon the policy, as in this caſe, the inſurer ſhall never be allowed, if a loſs happen, to defeat a *bonâ fide* inſurance, by ſaying to an innocent perſon, there was a ſecret partnerſhip between another and myſelf; and therefore the policy is void. But here the plaintiff is himſelf the underwriter, who comes to enforce an illegal contract: it is a partnerſhip *pro hac vice*: and this party cannot apply to a Court of Juſtice to enforce a contract founded in a breach of the law."

No motion was ever made to ſet aſide the nonſuit; but two or three days after, Lord *Kenyon* took occaſion to mention to the bar, that he had ſtated the caſe to the other Judges of the court of *King's Bench*, who were unanimouſly of the ſame opinion with his Lordſhip.

Mitchell and others, aſſignees of Robertſon a bankrupt, v. Cockburn, aſſignee of Tyler a bankrupt, 2 H. Blac. Rep. in C. P. 379.

In a more modern caſe, the deciſion in *Sullivan* v. *Greaves* came under diſcuſſion in the court of *Common Pleas*, and the opinion given by Lord *Kenyon* was confirmed by the unanimous opinion of that Court.

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The facts were, that the two bankrupts were engaged in a partnerſhip for the inſurance of ſhips, which was carried on in the name of *Robertſon*, who, at the time of his bankruptcy, had paid a much larger ſum for loſſes than he had received for premiums; and to recover a moiety of this ſum from *Tyler*'s eſtate was the object of this action. The Lord Chief Juſtice *Eyre* having nonſuited the plaintiffs at the trial, and a motion having been made to ſet the nonſuit aſide, the learned Judges, after argument at the bar, delivered their opinions.

Ld. Ch. J. *Eyre*.—"This queſtion depends on the true conſtruction of the ſtat. 6 *Geo.* 1. c. 18. By that act, the two corporations became the purchaſers of the excluſive privilege of inſuring on a joint ſtock; and to give effect to that privilege all other perſons are prohibited from inſuring on a joint ſtock. Now it appears clearly on the firſt view, that the proviſions of the act are at an end, if a perſon, by merely inſuring in his own name, can have the advantage of a joint capital, which the act meant to prohibit. This partnerſhip therefore is contrary to the ſpirit of the act; and it is alſo contrary to the letter of it. The 12th ſection directs, that all ſocieties, &c.* This does not at all go to confine the meaning of the legiſlature to an avowed partnerſhip, inſuring publickly in their own names; but the object is to prevent any other joint ſtock being embarked in inſuring. This being ſo, the conſequence unavoidably is, that no contract can ariſe directly out of ſuch a proceeding, ſo as to be the foundation of an action."

Mr. *J. Heath*.—"I am of the ſame opinion. It ſeems to me that the object of the ſtatute would be totally defeated, if it were to extend only to thoſe policies, in which the names of all the partners were inſerted. It expreſsly declares, that every policy ſubſcribed by any perſon acting in a partnerſhip ſhall be abſolutely null and void, though it may be true that the party ſubſcribing ſhall be eſtopped from ſetting up a ſecret partnerſhip to defeat a *bonâ fide* inſurance. And the reaſon is obvious; trade is carried on according to the capital employed. Now the inſurances would run to the extent of the capital, in whatever name the policy might be ſubſcribed. The object therefore of the ſtatute was to prevent the employ-

* Vide ſupra, p. 6.

ment

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ment of a joint capital, which would afford the greateſt competition with the eſtabliſhed corporations."

Mr. J. *Rooke*.—"As to the ſecond point, I agree that if the contract be illegal, no action can ariſe out of it. But as to the firſt queſtion, whether this contract were illegal or not, I muſt confeſs I had great doubts, till I heard the opinions of my Lord Chief Juſtice and my brother *Heath*, and alſo the caſe cited from *Park's Inſurance*, for it ſeemed to me that the ſtatute only meant to prohibit inſurances where both parties knew that a partnerſhip exiſted, but not where there was a ſleeping partnerſhip. But I was very much ſtruck with the obſervations of my brother *Heath*, that the extent of the inſurance would be in proportion to the capital employed, and if there were an increaſed capital there would be an increaſed rivalſhip with the corporations. Whatever doubts therefore I had, I ſubmit to the authority of the other Judges."

Booth v. Hodgſon, 6 Term Rep. 405, Acc.

Rule for ſetting aſide the nonſuit was diſcharged.

The rule then eſtabliſhed by all theſe caſes ſeems to be this, that if the credit of any company or ſociety (except the two mentioned in the ſtatute) be in any event pledged in a contract of this nature, the contract is void. And therefore where a company of ſhip owners engaged to inſure each other's ſhips, though they covenanted *ſeverally*, and not *jointly* to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares, yet as there was a clauſe providing that in caſe of the inſolvency of any one of the members, all the others were to be reſponſible, the contract was void.

Lees v. Smith, 7 Term R. 338.

But if in ſuch an aſſociation, each individual ſubſcriber is only liable for the ſum to which his name appears, and not for the default of the other ſubſcribers, it has been held by Lord *Kenyon*, that ſuch an aſſociation does not infringe on the act of parliament.

Harriſon v. Millar, Sittings after Mich. 1796. 7 Term R. p. 340. note (d).

There are clauſes, in a ſubſequent part of the ſtatute, ſecuring to the *South Sea* and *Eaſt India* Companies, all the rights and privileges which they had enjoyed previous to the paſſing of that act, and the right of lending money on bottomree to the captains of their own ſhips.

Sec. 24. 26. 28.

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This ſtatute is the only poſitive regulation to be found in the law of this country, with reſpect to what perſons ſhall, or ſhall not be inſurers. By virtue of that act, the two offices under the names of the *Royal Exchange Aſſurance* Office, and the *London Aſſurance* Office, were created and eſtabliſhed, by charter of *George* the Firſt, under the great ſeal of *Great Britain*, bearing date the twenty-ſecond day of *June*, in the ſixth year of his reign; and they ſtill continue offices for the inſurance of property. The legiſlature having thus anxiouſly provided for the ſecurity of thoſe merchants, who might be deſirous of carrying on an extenſive trade, but who were deterred from doing ſo, through fear of the inſolvency of underwriters, having ſtipulated with the company that they ſhould have ſufficient funds for the payment of all demands that might be made, and at the ſame time, allowing to private underwriters the full liberty of inſuring to any amount with thoſe who were ſatisfied to truſt to their private ſecurities only; it is not to be wondered at, that the buſineſs of inſurance encreaſed to a degree almoſt inconceivable. Indeed, any perſon, ſince this ſtatute, may inſure as at the common law, with this ſingle exception, that any policy ſubſcribed by a private firm or partnerſhip, is abſolutely void.

2dly. What things may be inſured. I beg leave here to premiſe, that I do not mean at preſent to go into the great queſtion of inſurance, *upon intereſt or no intereſt*, having reſerved that for the ſubject of a diſtinct chapter. My deſign in this place is only to ſhew, what kinds of property are the ſubject of inſurance, upon ſuppoſition that every perſon, making inſurance, is intereſted in the goods as the law requires.

The moſt frequent ſubjects of inſurance are ſhips, goods, merchandizes, the freight or hire of ſhips: alſo houſes, warehouſes, and the goods laid up in them from danger by fire: and inſurance on lives. Of the two laſt of which, more will be ſaid hereafter. But although inſurances upon ſuch property, as we have juſt enumerated, moſt frequently occur in practice; yet in the law books we meet with caſes which can hardly fall within any of thoſe deſcriptions.

1 Magens 4.

See poſt, chap. 22 and 23.

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Thus bottomree and *reſpondentia* are a particular ſpecies of property which may be the ſubject of inſurance. But then it muſt be particularly expreſſed in the policy to be *reſpondentia* intereſt; for under a general inſurance on *goods*, the party inſured cannot recover money lent on bottomree. Such has been, and is at this day, the eſtabliſhed uſage of merchants.

[10] This was ſolemnly decided in an action upon a policy of inſurance "upon *goods and merchandizes*, loaden, or to be "loaden aboard the *Denham*, *William Tryon*, commander, at "and from *Bengal*, to any ports or places whatſoever in the "*Eaſt Indies*, until her ſafe arrival in *London*." The evidence appeared to be, that before the ſigning of the policy, the plaintiff had lent Captain *Tryon*, *upon the goods*, then loaden, and to be loaden on board the ſaid ſhip, on account of the ſaid Captain *Tryon*, the ſum of ſeven hundred and ſixty-four pounds, at *reſpondentia*, for which a bond was executed in the uſual form: that the ſhip, at the time of the loſs, had goods and merchandizes on board, the property of Captain *Tryon*, of greater value than all the money he had borrowed: that the ſhip was afterwards burnt, and all the goods and merchandizes were totally conſumed and loſt. Upon theſe facts, the queſtion was, whether the plaintiff could recover. This caſe was twice argued at the bar; the court took time to conſider it, and were unanimous in their determination.

Glover v. Black, 3 Burrow 1394. and 1 Blackſtone Rep. 405.

Lord *Mansfield*.—"I inclined at the trial, and ſince upon the argument, to ſupport this inſurance, being convinced that it is fair, and that the doubt has ariſen by a ſlip in omitting to ſpecify (as it was intended to have been done) that this was a *reſpondentia* intereſt. The ground of ſupporting this inſurance, if it could have been ſupported, was a clauſe of the 19 *G.* 2. c. 37. *ſ.* 5. which, as to the purpoſe of inſurance, conſiders the borrower as having a right to inſure only for the ſurplus value, over and above the money he has borrowed at *reſpondentia*. Yet we are all ſatisfied that this act of parliament never meant, or intended to make, any alteration in the manner of inſurances; its view was to prevent gaming or wagering policies, where the inſurer had no intereſt at all; and if the lender of money at *reſpondentia* were to be at liberty

to

to insure for more than his whole interest, it would be a gaming policy; for it is obvious, that if he could insure all the goods, and insure his *respondentia* interest besides, this would amount to an insurance beyond his whole interest. In describing *respondentia* interest, the act gives the lender *alone* a right to make insurance on the money lent: so that the act left it on the practice. I have looked into the practice, and I find that bottomree and *respondentia* are a *particular species* of insurance in themselves, and have taken a particular denomination. I cannot find even a *dictum* in any writer foreign or domestic, that the *respondentia* creditor may insure upon the *goods, as goods*. I find too, by talking with intelligent persons very conversant in the knowledge and practice of insurances, that they always do mention *respondentia* interest, whenever they mean to insure it. It might be greatly inconvenient to introduce a practice *contrary to general usage*, and there may be some opening to fraud if it be not specified. The ground of our resolution is, "That it is now establish-"ed, as the law and practice of merchants, that *respondentia* "and bottomree must be specified and mentioned in the policy "of insurance."

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It is to be observed, that in this judgment the court confined itself entirely to the case then before it, but did not mean to decide, that a person, having a special interest in goods, could not recover under an insurance upon goods generally. Lord *Mansfield*, indeed, expressly said, at the conclusion of his argument, that they did not mean to determine, that no special interest in goods might be given in evidence, in other cases than in those of *respondentia* and bottomtee, if the circumstances of the case should happen to admit of it. The lien which a factor, to whom a balance is due, has upon the goods of his principal, comes under the exception taken by the court; and an insurance upon such an interest seems to have been admitted, if not absolutely held, to be good, in the case of *Godin* v. *London* Assurance Company, which will be fully stated in that part of this work, which treats of double insurances.

3 Burr. 1401.

1 Burr. 489.

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But although the caſe of *Glover* and *Black* is certainly good law, yet it has ſince been ruled, that money expended by the captain for the uſe of the ſhip, and for which *reſpondentia* intereſt was charged, may be recovered under an inſurance on *goods, ſpecie, and effects*, provided the uſage of the trade, which in matters of inſurance is always of great weight, ſanctions it.

Gregory v. Chriſtie, B. R. Trinity, 24 Geo. III.

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Thus in an action upon a policy of inſurance *on goods, ſpecie, and effects*, of the plaintiff, who was alſo the captain, on board the ſhip, the plaintiff claimed under that inſurance, money expended by him in the courſe of the voyage for the uſe of the ſhip, and for which he charged *reſpondentia* intereſt.

Lord *Mansfield*, after delivering his opinion upon another point, which aroſe in the cauſe, and which will be mentioned in another part of this work, ſaid, as to the ſecond queſtion, whether the words "*goods, ſpecie, and effects*" extended to this intereſt, I ſhould think not, if we were only to conſider the words made uſe of. But here there is *an expreſs uſage*, which muſt govern our deciſion. A great many captains in the *Eaſt India* ſervice ſwear, that this kind of intereſt is always inſured in this way, and I obſerve the perſon here inſured is the *captain*.

1 Magens 18.

By the marine regulations of moſt, if not of all, the trading powers in *Europe*, inſurances upon the wages of ſeamen are forbidden; a regulation founded in wiſdom and ſound policy. In *Great Britain*, a great and commercial nation, ſuch an ordinance is particularly neceſſary, and it is agreeable to the policy of the general law of that country, by which it is declared, "That no maſter or owner of any merchant ſhip "ſhall pay to any ſeaman, beyond the ſeas, any money or "effects on account of wages, exceeding one moiety of the "wages due, at the time of ſuch payment, till ſuch ſhip ſhall "return to *Great Britain* or *Ireland*." By this ſalutary law, the ſailors are intereſted in the return of the ſhip; they will, on that account, be prevented from deſerting it when abroad,

8 Geo. I. ch. 24. ſ. 7.

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from leaving it unmanned, and in times of danger, arising either from perils of the ſea, or the attacks of an enemy, will be more anxious for its preſervation. But theſe good effects would be entirely defeated, if inſurance on their wages were to be permitted; for to whatever cauſe the loſs might be attributed, they would ſtill be ſecure. Since the former editions of this work, it has been held in an expreſs caſe upon the ſubject, that a ſailor can neither inſure his wages, nor any commodity, which he is to receive at the end of the voyage in lieu of wages. However, it ſhould ſeem, that this regulation does not mean to prevent mariners from inſuring for the homeward voyage thoſe wages, which they have received abroad, or goods which they have purchaſed with thoſe wages in order to bring them home; but, in ſuch a caſe, they are to be conſidered in the ſame light with other men.

Webſter v. De Taſtet, 7 Term R. 157.

1 Magens 19.

In an action upon a policy of inſurance upon *Fort Marlborough*, otherwiſe *Bencoolen*, in the *Eaſt Indies*, for twelve calendar months, from the firſt of *October* 1759, to the firſt of *October* 1760, againſt any *European* enemy, for the benefit of the governor, it was doubted by the learned chief juſtice who tried that cauſe, whether a policy againſt the loſs of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a ſailor to inſure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cauſe, after mentioning this doubt, which had occurred to his mind, he went on thus: "But conſidering that this place, though called a "fort, was really but a factory or ſettlement for trade; and "that he, though called a governor, was really but a mer-"chant; conſidering too, that the law allows a captain of "a ſhip to inſure goods which he has on board, or his ſhare "in the ſhip, if he be a part owner; and the captain of a "privateer, if he be a part owner, to inſure his ſhare; con-"ſidering too, that the objection could not, upon any ground "of juſtice, be made by the inſurer, who knew him to be "the governor at the time he took the premium; and as "with regard to principles of publick convenience, the caſe "ſo ſeldom happens, (I never knew one before), any danger

Carter v. Boehm, 3 Burr. 1905. and 1 Blackſt. 593.

[13]

Lord Mansfield.

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" from the example is little to be apprehended; I did not " think myſelf warranted, upon that point, to nonſuit the " plaintiff; eſpecially too, as the objection did not come from " the bar. Though this point was mentioned, it was not " inſiſted upon at the laſt trial; nor has it been ſeriouſly " argued, upon this motion, as ſufficient alone to vacate the " policy: and if it had, we are all of opinion, that we are " not warranted to ſay, that it is void upon that account."

Ord. of Stockholm. Bynkerſhoek's Queſt. Juris pub. lib. 1. c. 21. p. 353.

It has long been a queſtion, how far inſurances upon the ſhips or goods of enemies are politick or legal. Upon the continent of *Europe* it ſhould ſeem, that they are in general abſolutely prohibited, under penalty of the inſurance being void, and the delinquent's forfeiting the ſum, to which he had ſubſcribed. Theſe laws have been paſſed from an idea, that ſuch inſurances are prejudicial to the intereſts of the country tolerating ſuch contracts, by enabling an enemy to

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continue his trade, on account of the degree of protection thus afforded him againſt the maritime ſtrength of the nation making the inſurance. In *England*, till very lately, this queſtion has been undecided: but the court of King's Bench have, in two very modern inſtances, been unanimouſly of opinion that ſuch inſurances are illegal and abſolutely void. I ſhall, however, when I come to the chapter on illegal voyages, ſtate the arguments on both ſides of this important queſtion. In this place I ſhall only obſerve, that in the year 1748, a bill was introduced into parliament, " to " prevent aſſurances on ſhips belonging to *France*, and on " merchandizes and effects laden thereon, during the then " exiſting war with *France*." That bill was oppoſed on principles of policy and expediency, by the two greateſt lawyers and moſt eminent ſpeakers of that age, the Honourable *William Murray* and Sir *Dudley Ryder*; but the legiſlature thought proper to paſs the bill into a law, inflicting a penalty of 500*l.* upon the perſons making ſuch inſurances, and alſo declaring the policy to be void.

Brandon v. Neſbitt, and Briſtow v. Towers. 6 Term Rep. 23 and 35.

Deb. in Houſe of Com. by Debrett, vol. ii. p. 171.

21 Geo. II. c. 4.

The exiſtence of that act, however, was limited by the duration of the then war. But in the preſent war a ſimilar legiſlative

legiſlative proviſion has been made, declaring that inſurances in the act mentioned ſhall not only be void, but the offending perſon ſhall be impriſoned three months. This ſtatute is alſo temporary; but the deciſions above alluded to, and which will be fully quoted hereafter, have determined that all inſurances upon the property of an open enemy are void, independant of the acts of parliament. It is not to be diſſembled that theſe deciſions are rather in oppoſition to the ſentiments of Lord *Mansfield* and Lord *Hardwicke:* for although the caſe does not ſeem ever to have come for a judicial opinion before them, yet it is evident, from what they have declared both in parliament and on the bench, that on principles of expediency, thoſe illuſtrious men were inclined to ſupport ſuch inſurances, although it ſhould ſeem, with all deference to ſuch names, that even the expediency of the meaſure may greatly be doubted.

CHAP. I.

33 Geo. III. c. 27. ſ. 4.

1 Vez 320. Gift v. Maſon. Sittings at Guildhall, Mich. Vac. 1785.

One ſpecies of inſurance on foreign ſhips or goods was prohibited by ſtatute, with a view to ſecure to the *Eaſt India* company the ſole trade to and from the *Eaſt Indies*, and other places, beyond the *Cape of Good Hope*. The ſtatute, after reciting, that to admit of inſurances on the ſhips or veſſels of foreigners trading to the *Eaſt Indies*, may be a means of encouraging his majeſty's ſubjects to ſhare with foreigners, in eſtabliſhing new ſocieties or companies for carrying on the ſaid trade in the dominions of foreign ſtates or princes, enacts, "That no inſurances ſhall be made, or money lent "on bottomree, on foreign ſhips or goods, bound to or from "the *Eaſt Indies*, under the forfeiture of treble the ſum in- "ſured or lent." It contains an exception, however, in favour of inſurances made, or to be made, on ſhips of the ſubjects of ſuch ſovereigns, as carried on a trade with that part of the world, previous to the month of *October* 1748. This act was to be in force for ſeven years. Whether upon a trial it was found to be a politick or wiſe regulation, I have not been able to diſcover: but the preſumption is to the contrary; as it does not appear from the ſtatute book, that this act of parliament was continued, or that it was revived by any ſubſequent ſtatute.

25 Geo. II. c. 26.

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3dly. Of the requiſites of a policy. The form of a policy, now uſed in *London*, is nearly the ſame which was adopted two hundred years ago, as may be collected from *Malyne*; but its antiquity cannot preſerve it from juſt cenſure, it being very irregular and confuſed, and frequently ambiguous, from making uſe of the ſame words in different ſenſes.

Malyne 108. 3 Burr. 1555.

The eſſentials in the contract of inſurance are: Firſt, the name of the perſon for whom the inſurance is made: Secondly, the names of the ſhip and maſter: Thirdly, whether they are ſhips, goods, or merchandizes, upon which the inſurance is made: Fourthly, the name of the place where the goods are laden, and whither they are bound: Fifthly, the time when the riſk begins, and when it ends: Sixthly, all the various perils and riſks which the inſurer takes upon himſelf: Seventhly, the conſideration, or premium, paid for the riſk or hazard run: Eighthly, the month, day, and year, on which the policy is executed: Ninthly, the ſtamps required by act of parliament. Of each of theſe in their order.

Firſt, Of the name of the perſon inſured. It was formerly very much the practice to effect policies of inſurance, *in blank* as it was called, that is, without ſpecifying the names of the perſons, for whoſe uſe and benefit, or on whoſe account ſuch inſurances were made; a practice which had been found in many reſpects to be miſchievous, and productive of great inconveniencies. This miſchief was remedied at a very early period in *Genoa* and *France* by the marine ordinances of thoſe countries, which required the name of the perſon inſured to be inſerted in the policy, and whether he was to be conſidered in the capacity of principal or factor. In *England* a ſimilar regulation took place in the year 1774, with reſpect to inſurances upon lives; but it was not till the year 1785, that any proviſion was made upon the ſubject as to policies upon ſhips and merchandizes, the ſtatute of the 14th *Geo.* 3. having in terms exempted marine inſurances from its operation.

2 Magens 65. 169.

14 Geo. III. c. 48.

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The ſtatute declares, "That, from and after the fifth day "of *July* 1785, it ſhall not be lawful for any perſon or per-"ſons,

25 Geo. III. c. 44.

"ſons, who reſide in *Great Britain*, to make, or cauſe to be "made, any policy or policies of inſurance upon his, her, or "their intereſt in any ſhip or ſhips, or any goods, merchan- "dizes, effects, or other property, without inſerting in ſuch "policy or policies, *his, her, or their own name or names*, as "the perſon intereſted therein, or the *name or names of the* "*perſon or perſons*, who ſhall effect the ſame, *as the agent or* "*agents* of the perſon or perſons ſo really intereſted therein, "or for whoſe uſe or benefit, or on whoſe account, ſuch "policy or policies is or are underwrote: and that it ſhall "not be lawful for any perſon or perſons, who ſhall not live "or reſide in *Great Britain*, to make, or cauſe to be made, "any policy or policies of aſſurance upon his, her, or their "intereſt in any ſhip or ſhips, or on any goods, merchandizes, "effects, or other property, without inſerting in ſuch policy "or policies the name or names of the agent or agents of "the perſon or perſons ſo really intereſted therein, and for "whoſe uſe or benefit, or on whoſe account, the ſame is "or are ſo made and underwrote: and that every policy or "policies of aſſurance, made or underwrote contrary to the "true intent and meaning hereof, ſhall be null and void to "all intents and purpoſes."

See Cox and another, Executors, v. Parry, 1 TermRep. 464. in which it was held that the Executors could not recover, becauſe, amongſt other grounds, the name of their Teſtator was not inſerted in the policy.

Upon the ſtatute juſt recited, a queſtion of ſome conſequence very ſoon aroſe, namely, Whether, when the agent effects a policy for the principal reſiding abroad, it be neceſſary to inſert his name in the policy, *as agent*. Upon a debate, it was held, that if it be not ſtated, that he effected the policy, *as the agent* of the principal, the policy will be void within the ſtatute. Another queſtion alſo occurred in the ſame cauſe, Whether it was not the intention of the legiſlature, when the principal reſided abroad, that the agent ſhould live in *England*. It did not become neceſſary for the court to decide the latter queſtion; but the leaning of the judges clearly was in the affirmative.

Pray and others v. Edie, 1 Term Rep. p. 313.

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If there were more perſons intereſted than one, it was abſolutely neceſſary under the above ſtatute that the names of all ſhould be inſerted, otherwiſe the policy was void: Nor would any other deſcription anſwer the deſign of that ſtatute.

Thus

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Wilton and others v. Reaſton, B. R. at Guildhall Sittings after Michaelmas 1787.

Thus in a caſe, where there were ſeveral plaintiffs, the policy was made "*in the name of Mr. William Wilton and the reſt* "*of the owners*," Mr. Juſtice *Buller* held the policy was void under the ſtatute.

The deciſions which have been made upon this ſtatute have now become very immaterial; and are only referred to in order to ſhew the complete hiſtory of that branch of the law, which we are diſcuſſing: for ſuch miſchiefs and inconveniencies were found to ariſe to perſons intereſted in ſhips or veſſels from that act of parliament; that by a ſubſequent ſtatute, it was wholly repealed. But it was not deemed expedient again to allow of policies in blank; and therefore the ſame ſtatute declared, "That it ſhould not be lawful, from "and after the paſſing of that act, for any perſon or perſons, "to make or effect, or cauſe to be made or effected, any "policy of aſſurance on any ſhip or veſſel, or upon any "goods, merchandizes, effects, or other property whatſoever, "without firſt inſerting, or cauſing to be inſerted in ſuch "policy, the name or names, or the uſual ſtile and firm of "dealing of one or more of the perſons intereſted in ſuch "aſſurance; or without, inſtead thereof, firſt inſerting the "name or names of the uſual ſtile and firm of dealing of the "conſignor or conſignors, conſignee or conſignees, of the "goods or property ſo to be inſured; or the name or names, "or the uſual ſtile and firm of dealing of the perſon or per-"ſons reſiding in *Great Britain*, who ſhall receive the order "for and effect ſuch policy, or of the perſon or perſons who "ſhall give the order or directions to the agent or agents im-"mediately employed to negociate or effect ſuch policy. The "ſtatute further declares that every policy made or under-"wrote contrary to the true intent and meaning of this act, "ſhall be null and void to all intents and purpoſes."

28 Geo. III. ch. 56.

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De Vignier v. Swanſon, B. R. Mich. 39 Geo. III.

Upon this act it has been held, that it is not neceſſary where a policy is effected by an agent, to add the word *agent* or any other deſcription to his name, in the policy itſelf.

Bell v. Gilſon, Boſanquet and Puller's Rep. 1 Vol. 345.

And it has alſo been decided, that a policy effected by a broker, deſcribing himſelf therein *as agent*, has ſufficiently complied with the requiſition of the ſtatute.

Previous

Previous to the paſſing of either of theſe acts it was held, that the huſband of a ſhip had no right to inſure for any part-owner, without his particular direction; nor for all the owners in general, without their general direction, or ſomething equivalent to it.

French v. Backhouſe, 5 Bur. 2727.

Secondly, of the names of the ſhip and maſter. I do not find any expreſs regulation of this matter in *England*; but it ſeems to be neceſſary, by the law and uſage of merchants, to inſert the names of the ſhip and maſter, in order to fix with preciſion the bottom upon which the adventure is to be made, and the captain, by whoſe direction the ſhip is to be navigated, becauſe, according to the degree of ſtrength and ſufficiency of the one, and the ſkill, ability, and knowlege of the other, the riſk is encreaſed or diminiſhed; and ſo alſo probably will the amount of the premium be regulated. The uſage of the merchants of *England* in this reſpect is agreeable to the expreſs laws and regulations of other maritime ſtates upon this point. Sometimes, however, there are inſurances generally "*upon any ſhip or ſhips*" expected from a particular place: and although it is more accurate to inſert the name of the captain, I would not be underſtood to aſſert, as no deciſion has been made, that if a different captain came in the ſhip from that whoſe name is mentioned in the policy, it would therefore be void; eſpecially as the policy always contains the words "or whoſoever elſe ſhall go for maſter in the ſaid ſhip."

Ord. of Lew. 14. tit. Inſurance, art. 3. Ord. of Amſterdam, ſ. 2.

Since the publication of the two firſt editions of this work, the validity of theſe inſurances *upon ſhip or ſhips* was very elaborately diſcuſſed in the court of Common Pleas, and the judgment of the court, conſiſting of Lord Chief Juſtice *Eyre*, Mr. Juſtice *Buller*, Mr. Juſtice *Heath*, and Mr. Juſtice *Rooke*, was unanimous in their favour; and that the aſſured had a right to cover by ſuch policy whatever ſhip he thought proper, that fell within the terms of it. The facts of the caſe were theſe—On the 24th *May* 1793, *Freeland* and *Rigby*, merchants at *Saint Vincents*, wrote to the plaintiffs, merchants at *Liverpool*, who were alſo partners in a houſe of the ſame name at *Grenada*, requeſting them to get 1,260 *l.* inſured on 70

[19 *a*]

Kewley and another v. Ryan, 2 H. Blackſt. Rep. p. 343. See this caſe again quoted for another point, poſt, c. 17. p. 316.

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bales of cotton ſhipped on board the *Elizabeth*, from *Grenada* to *England*, and alſo 1,300 *l.* on another cargo of cotton and other goods, which they intended to ſhip on board *ſome other ſhip* that ſhould ſail with the firſt convoy, and therefore directed the latter inſurance to be *on ſhip or ſhips*. The plaintiffs accordingly, by their broker, inſured 1,260 *l.* on board the *Elizabeth* in *London*, and 1,300 *l.* on board *ſhip or ſhips*, viz. 700 *l.* at *Liverpool*, and 600 *l.* in *London*. The policy for 700 *l.* of which the defendant underwrote 50 *l.* and on which the action was brought, was *at and from Grenada to Liverpool*, on any kind of goods as intereſt ſhould apppear, *in ſhip or ſhips on account of Freeland and Rigby*, warranted to ſail on or before the 1ſt of *Auguſt* 1793, and to return 3 *per cent.* if the ſhip ſailed with convoy bound to *Great Britain*, and arrived, *&c.* without any exception of the goods on board the *Elizabeth*. The policy for 600 *l.* effected in *London*, was alſo *on ſhip or ſhips*, at and from *Grenada* to *Liverpool*, but with an exception of 1,260 *l.* "on 70 bales of cotton *per Elizabeth, Crettin*," the ſame underwriters in *London* having before ſubſcribed the policy on the *Elizabeth*. But the plaintiffs did not communicate to the underwriters at *Liverpool* the Letter of *Freeland* and *Rigby*, directing an inſurance on the *Elizabeth*, nor any circumſtance reſpecting the goods ſhipped on board the *Elizabeth*, and the inſurance made on that ſhip. The *Elizabeth* ſailed early in *June*, and arrived ſafe at *Liverpool* in *Auguſt* 1793. The *Heart of Oak*, on board of which *Freeland* and *Rigby* had ſhipped their ſecond cargo of cotton, *&c.* ſailed the latter end of *July*, bound for *Liverpool*, but with a deſign *formed before the commencement of the voyage*, (as appeared by clearances, and was admitted on all ſides), to touch at *Cork* in her way to *Liverpool*, but was totally loſt before ſhe arrived at the dividing point. The defendant pleaded the general iſſue, and a tender of 1 *l.* 10 *s.* on account of the ſafe arrival of the *Elizabeth*, which plaintiff took out of court, and obtained a verdict for 48 *l.* 19 *s.*

A rule having been obtained to ſhew cauſe, why there ſhould not be a new trial on ſeveral grounds, the court diſcharged the rule, declaring as to this point, that the legality of

of the policy on *ſhip or ſhips* was too well eſtabliſhed, both by uſage and authority, to be diſputed: As to the ſecond, that the aſſured had clearly a right to apply ſuch an inſurance to whatever ſhip he thought proper, within the terms of it; for which the caſe of *Henchman* v. *Offley*, was an authority.

B. R. Michael. 23 Geo. III. See that caſe fully reported, 2 H. Black. Rep. 345. Note (*a*).

It has alſo been held, that the owners of goods inſured, by the act of ſhifting the goods from one ſhip to another, do not preclude themſelves from recovering an average loſs ariſing from the capture of the ſecond ſhip, if they acted from neceſſity, and for the benefit of all concerned.

Plantamour v. Staples, 1 Term R. 611. note (*a*) upon a caſe reſerved.

Thirdly, whether they are ſhips, goods, or merchandizes, upon which the inſurance is made, is a fact which muſt be ſtated. It is abſolutely neceſſary that there ſhould be a ſpecification upon which of theſe the underwriter inſures; becauſe otherwiſe it would be impoſſible to know, whether, in any inſtance, he is liable or not to the loſs ſuſtained. But it is another queſtion, whether, in policies upon goods, it be neceſſary to declare the particulars. The practice, I believe, is very unſettled. It is the opinion, however, of a very reſpectable merchant, that the particulars of goods ſhould be ſpecified, if poſſible, by their marks, numbers, and packages, rather than that they ſhould be included under the general denomination of merchandize; or that if it be agreed to inſert them, when known to the inſured, care ſhould be taken not to omit it, as ſuch ſpecification prevents much trouble in proving to the inſurer the particular goods inſured, which are more or leſs ſubject to damage. But this mode of particularizing property is only adviſeable to be done, or, indeed, can only be done, when the riſk commences at home; becauſe, when goods are coming from abroad, it is better to inſure under general expreſſions, on account of the various caſualties, which may happen to obſtruct the purchaſe of the commodities intended to be ſent. It may be proper here to mention, that there are certain kinds of merchandize, which are of a periſhable nature, and liable to early corruption; on account of which, the underwriters of *London* have inſerted a memorandum at the foot of their policy, by which they declare, that

1 Magens 8.

Vide the Append. No. 1.

in

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in insurances upon corn, fish, salt, fruit, flour, and seed, they will not be answerable for any partial loss, but only for general averages, unless the ship be stranded. That in insurances on sugar, tobacco, hemp, flax, hides, and skins, they consider themselves free from partial losses, not amounting to *five per cent.* and that on all other goods, as well as on the ship and freight, if the partial loss be under *three pounds per cent.* unless it arise from a general average, or the stranding of the ship, they also consider themselves discharged.

[21]

Per Buller Justice in Cooking v. Fraser, B. R East. 25 Geo. III. vide post.

This clause was introduced in the year 1749, in order to prevent the underwriters from being harassed by trifling demands, which must necessarily have arisen upon every insurance of this kind, on account of the perishable nature of the cargo. The form of this memorandum was universally used, as well by the two insurance companies, as by private underwriters, till the year 1754, when Lord Chief Justice *Ryder* ruled, and a special jury, agreeably to his direction, decided, that a ship, having run a-ground, was a stranded ship within the meaning of the memorandum; and that although she got off again, the underwriter was liable to an *average or partial loss* upon damaged corn. This decision induced the two companies to alter the memorandum, by striking out the words, "*or the ship be stranded*;" so that now they consider themselves liable to no losses, which can happen to such commodities, except general averages and total losses: But the old form is still retained by the private insurers.

Cantillon v. Lond. Assur. Comp. mentioned, 3 Burr. 1553.

What shall be considered as losses within the meaning of this memorandum, will be the subject of future investigation, my design at present being only to enumerate the essentials of a policy, and the reason and origin of them, as far as I have been able to trace them.

There are, however, some kinds of property, which do not fall under the general denomination of goods in a policy, and for the loss of which the underwriters are not answerable unless they are specifically named.

A

CHAP. K.

An action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's cloaths, and the ship's provisions. It was proved by an underwriter and a broker, that none of those things are within a general policy on goods; for the risk was greater as to goods lashed on deck than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name; and the premium is greater.

Ross v. Thwaite, Sit. after Hil. 16 Geo. III. at Guildh.

[22]

Lord *Mansfield* said, he thought it consistent with reason, and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

It is a question whether a cargo of dollars, or other coin, jewels, *&c.* if lost, be recoverable under a policy upon goods and merchandizes generally: and I can find no printed case, where the question has been at all discussed in *England*. In one case, *De Costa* v. *Firth*, the subject matter of the insurance was bullion, and the policy was general on goods and merchandizes: but no objection was taken on that ground, nor was the point ever argued. By the ordinances of several foreign states, *Middleburg*, *Amsterdam*, *Konigsberg*, and others, it is *specially* declared, that money shall not be recovered under the denomination of goods or merchandize; but the insurance must, in the policy, be expressed to be upon money to render it valid. The book, in which the ordinances above referred to are collected, states explicitly that gold and silver, coined and uncoined, pearls and other jewels, may be insured at *London* and *Hamburgh*, and several other places, under the general expression of merchandise.

4 Burr. 1966.

2 Magens 71, 89, 131, 187.

1 Magens 10.

Roccus, in his treatise upon insurances, concurs in the latter opinion, and quotes *Santerna* upon the subject; he draws a distinction, upon the merits of which I do not presume to decide, between money or jewels, for the purposes of commerce,

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commerce, which conſtitute part of the cargo, and ſuch as are merely perſonal, and for private purpoſes; the former being clearly liable to contribute to a general average, but not the latter. His words are theſe: "*Aſſecurans merces in talem "navem immiſſas, intelligitur aſſecurare pecuniam, aurum, ar- "gentum, gemmas, margaritas, et annulos in dicta navi exiſten- "tes, quæ omnia, appellatione mercium, in navem immiſſarum, "comprehenduntur, licet expreſſa non fuiſſent. Santerna decla- "rat, quod ſi pecuniæ, margaritæ et annuli erant deſtinati ad "vendendum vel mercandum alias merces, tunc appellatione mer- "cium veniunt, et in aſſecuratione comprehenduntur, et loco mer- "cium habentur: vocat dictas res merces, cum occaſione earum, "habeat locum contributio, ſicut aliarum rerum, ne in iſtis aſſe- "curationibus mercatorum potius apices juris, quam veritas ob- "ſervari videantur: et tandem, quia largè comprehenduntur "omnes res, quæ ſunt deſtinatæ ad negotiandum, et facit etiam, "quod confiſcatio mercium navis extenditur etiam ad pecuniam "numeratam.*" I forbear to draw any concluſion from theſe premiſes, which is the plan I have uniformly adopted, where there is no adjudged caſe upon the queſtion.

See poſt, p. 127, 129.

Roccus Not. 17.

Fourthly, The name of the place at which the goods are laden, and to which they are bound.

This has been always held to be neceſſary in policies, at leaſt for upwards of two hundred years; and muſt be ſo, on account of the evident uncertainty which would follow from a contrary practice, as the inſurer would never know what the riſk was, which he had undertaken to inſure.

Molloy, b. 2. c. 7. ſ. 14.

Molloy has laid down this doctrine, that if a ſhip be inſured from *London* to , a blank being left by the lader of the goods to prevent a ſurprize by the enemy, and if in her voyage ſhe happen to be caſt away, though there be private inſtructions for her port, yet the inſured muſt ſit down with his loſs, by reaſon of the uncertainty. In ſupport of his opinion, he cites the caſe of Monſieur *Gerdan*, governor of *Calais*, which was decided by commiſſioners of aſſurance at *Rouen* againſt the aſſured, becauſe, although the

the bills of lading truly declared the quantity and quality of the goods, the port of the ſhip's diſcharge was left a blank, on account of the war, which was then exiſting. Such alſo is now the law and uſage of merchants.

It is alſo cuſtomary to ſtate in the policy at what port or places the ſhip may touch and ſtay during the voyage, ſo that it ſhall not be conſidered as a deviation to go to any of thoſe places.

Fifthly, The time when the riſk commences, and when it ends. In moſt of the commercial countries abroad, it is particularly expreſſed, either in their ordinances or policies, and ſometimes in both, that the riſk of the inſurers ſhall commence, the moment the goods quit the ſhore, and ſhall continue till they are landed at the place of their deſtination: and that the inſurer not only runs the riſk in the ſhip named in the policy, but alſo in all the boats or lighters, that ſhall be employed in carrying the goods aboard, and alſo in fetching them aſhore. But the cuſtom of this country is very different, for the *Engliſh* policies expreſsly declare, that "the "adventure ſhall begin upon the ſaid goods and merchandizes "*from the loading thereof on board the ſaid ſhip*, and ſo ſhall "continue until the ſaid ſhip, goods, and merchandizes ſhall "be arrived at L. and upon the ſaid ſhip until ſhe hath "moored at anchor 24 hours in good ſafety; and *upon the* "*goods till the ſame be there ſafely diſcharged and landed.*" From theſe words, it is obvious, that inſurers are not anſwerable for any accidents, which may happen to the goods in lighters or boats going aboard, *previous* to the voyage; yet as the policy ſays, the riſk ſhall continue *till the goods are ſafely landed*, it ſeems no leſs obvious, that where ſhips cannot come cloſe to the quay in order to unload, the inſurer continues reſponſible for the riſk to be run in carrying the goods in boats to the ſhore. If there be a loſs, however, in theſe caſes, the accident muſt have happened while the goods were in the boats or lighters belonging to the ſhip; for then it is conſidered as a continuance of the ſame ſhip and voyage. But in a caſe where the owner of the goods brought down his

Ord. of Antwerp, Amſterdam, France, Spain, and Copenhagen.

[23]

Vide Appendix, No. 1.

As to continuance of the riſk *upon the ſhip*, ſee c. 2. page 31.

Sparrow v Carruthers, 2 Stra. 1236.

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own lighter, received the goods out of the ſhip, and before they reached land, an accident happened, whereby the goods were damaged, a ſpecial jury of merchants, under the expreſs direction of Lord Chief Juſtice *Lee*, found that the inſurer was diſcharged, although the inſurance was upon goods to *London*, and *till the ſame ſhould be ſafely landed there.*

By the ordinances laſt referred to, the number of days, in which people are obliged to unload their goods, is ſtipulated; but in *England* no expreſs time is fixed, the owners being left to their own diſcretion, provided there is no unreaſonable delay, which muſt always depend upon circumſtances.

See poſt, p. 44. Noble v. Kennoway.

1 Magens 47.

The riſk on the body of a ſhip, according to the form of the policy received in practice, is to commence in general, "at and from and ſo ſhall continue and "endure *until the ſaid ſhip ſhall arrive at* "and hath there been moored at anchor twenty-four hours "in good ſafety."

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When inſurance is made indeed on the homeward riſk, the beginning of the adventure is ſometimes ſtated to be "immediately from and after her arrival at the port abroad;" at other times, "from the departure;" and in ſhort, it is ſo variable, that nothing certain can be ſaid upon the point, depending, as it always has, and always muſt, upon the inclinations of the inſured, as expreſſed in the contract.

Sixthly, Of the various perils and riſks, againſt which the underwriter inſures. Theſe muſt always be inſerted in all policies, and indeed the words now uſed are ſo comprehenſive that in the opinion of *Molloy*, all thoſe curious queſtions which occaſioned much debate and controverſy among the lawyers of former days, are now finally ſettled. Be this as it may, it is certain, that there is hardly any event which the imagination can form, as likely, in the common courſe of things, to happen to any ſhip, that is not amply provided for by the policies now uſed by underwriters. They undertake

Book 2. c. 7. f. 7.

to bear "all perils of the ſeas, men of war, fire, enemies, "pirates, rovers, thieves, jettiſons, letters of mart, and "counter mart, ſurpriſals, takings at ſea, arreſts, reſtraints, "and detainments of all kings, princes, and people, of what "nation, condition, or quality ſoever; barratry of the maſter "and mariners, and all other perils, loſſes, and misfortunes, "that have or ſhall come to the hurt, detriment, or damage "of the ſaid goods and merchandizes, and ſhip, or any part "thereof." But although the words, deſcriptive of the hazards run by the inſurers, be ſo very large and comprehenſive, it ſhould ſeem that a great difference is to be made between the damage ſuſtained by goods from injuries *on board* a ſhip, and that which occurs by external accidents; that the inſurer is liable in the latter caſe cannot admit of a doubt, but as the former may proceed from the bad ſtowage of the goods, or from their being expoſed to wet; and as they are neglects attributable to the maſter; the ſhip and not the inſurer ought to be anſwerable. Upon this point, however, I find no caſe in the reports, and therefore I merely ſtate what I conceive to be underſtood as the law upon the ſubject. In *Malyne* it is ſaid, that if there be thieves on ſhip-board among themſelves, the maſter of the ſhip is to anſwer for that, and to make it good, ſo that the inſurers are not to be charged with any ſuch loſs, for he ſuppoſes the word "thieves" to mean *aſſailing thieves* only, for ſo he terms them. It is certain, that a modern ſtatute gives ſome countenance to this idea, by the preamble to which it appears, that previous to the period of paſſing that act, the owners of the ſhip were liable to the proprietors of the goods for any embezzlement, ſecreting, or making away with, of the goods, by the maſter or the mariners, or with their privity, to whatever amount the value might be: by that ſtatute, however, the meaſure of the reſponſibility is to be the value of the ſhip and freight (*a*). To be ſure, it is not a neceſſary conſequence, that becauſe the owner is liable in ſuch a caſe, therefore the inſurer, if an in-

See the Appendix.

1 Magens 50.

Malyne, c. 15. Lex. Mercat. Red's 4th edit. p. 295.

[25]

7 Geo. II. c. 15.

(*a*) By a ſubſequent ſtatute, 26 *Geo.* III. ch. 86. the owner's reſponſibility is limited to the value of the ſhip and freight, even in caſes of *external* robbery, without the privity of the maſter or mariners: and by the 2d ſection, owners are wholly exempted from any loſs occaſioned by fire.

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surance has been made, must be discharged, especially as the underwriter expressly undertakes, by the terms of the policy, to answer for the barratry of the master and mariners. *Roccus*, however, is of opinion, that when a theft is committed *on board* the ship, and some goods have been stolen, then the insurers are not bound, because the owner of the goods, as much as in him lies, is obliged to take care of them; and if they are stolen, while in the vessel, this cannot be called an *accident*, but has happened through the *negligence* of those, who did not take proper care of them. He adds, that the master or owners being liable is an additional reason for this regulation, because the master of the ship is held answerable for thefts committed therein, as by receiving the goods on board, he enters into a tacit agreement to deliver them safe and whole. It was thought proper thus to state the opinion of this learned writer upon the subject, the law of *England* in this respect being silent; though his reasoning upon this subject is by no means conclusive as to *English* insurances, on account of the express terms of the contract.

Roccus de assecurationibus, Not. 42.

But that the underwriter is liable for a robbery of the goods insured, when committed by thieves from without, cannot be doubted; as thieves are a peril expressly insured by the policy.

Harford v. Maynard, bef. Lord Mansfield at Guildhall, Hil. Vac 1785. Molloy, b. 2. c. 7. s. 5.

In addition to the various risks above enumerated, which the underwriters take upon themselves, it is the general practice, to insure *lost or not lost*, which is certainly very hazardous; because if the ship or goods should be lost at the time of the insurance, still the underwriter, provided there be no fraud, is liable. The premium is, however, in proportion, depending upon the circumstances stated to shew the probability or improbability of the ship's safety. These words "*lost or not lost*," are peculiar to *English* policies, not being inserted in the policies of foreign nations.

Roccus Not. 51. 5 Burr. 2803.

[25 a]

There is one case, in which, by act of parliament, the underwriters are prevented from paying upon certain of the risks mentioned in the printed policies, and that is in insurances upon

upon cargoes of ſlaves. The acts of parliament upon this ſubject are annual acts, for regulating the ſhipping, and carrying ſlaves in *Britiſh* veſſels from the coaſt of *Africa*: but they have now been continued for ſeveral years, and, on account of the benefits derived to the ſlaves from the humanity of thoſe proviſions, are likely to be continued. With a view, therefore, to procure better treatment, when in health, and a greater degree of care and attention when in ſickneſs, for the objects of this traffic, the legiſlature has provided, that though the uſual printed words may remain on the face of the policy, that no loſs or damage ſhall thereafter be recoverable on account of the *mortality* of ſlaves, *by natural death or ill treatment*, or loſs *by throwing overboard* of ſlaves on any account whatever, or loſs or damage by reſtraints and detainments, by kings, princes, people, or inhabitants of *Africa*, where it ſhall be made appear that ſuch loſs or damage has been occaſioned through any aggreſſion for the purpoſe of procuring ſlaves, and committed by the maſter of any ſuch ſhip, or by any perſon or perſons commanding any boat or boats, or party or parties of men belonging to any ſuch ſhip, or by any perſon or perſons acting by the direction of any ſuch maſter or commander reſpectively.

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34 Geo. III. c. 80. ſ. 10. continued by 39 Geo. III. c. 80. ſ. 24, 25.

Seventhly, The conſideration or premium for the riſk or hazard run: this is the moſt material part of the policy, becauſe it is the conſideration of the premium received, that makes the underwriter liable to the loſſes that may happen. In *Engliſh* policies it is always expreſſed to have been received at the time of underwriting; "we the aſſurers confeſſing "ourſelves paid the conſideration due unto us for this aſſu- "rance by the aſſured." This being ſubſcribed by the underwriter, it is proper to enquire whether, if the premium were not actually paid at the time, he could afterwards maintain an action for it againſt the *aſſured*, who might then produce his ſubſcription, as evidence againſt himſelf. One old caſe has been found upon the ſubject, but that is by no means ſatisfactory. It was an action of aſſumpſit, and the plaintiff declared that the defendant was indebted to him in twenty pounds, for a premium upon a policy of inſurance on ſuch a

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Fowk v. Pinſacke, 2 Lev. 153.

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ſhip. The defendant demurred *ſpecially*, becauſe the plaintiff did not ſhew the conſideration certainly, what the premium was, or how it became due: but the objection was not allowed, for this is as good as an *indebitatus pro quodam ſalario*, which has been adjudged good. Here, however, is no deciſion upon the merits, nor does it appear, whether the defendant was the broker or the inſured himſelf. It is true, in practice, policies in general are effected by the intervention of a broker; and by the uſage of trade, open accounts are kept between the inſurers and brokers, in which caſe, the underwriter may have an action againſt the broker for premiums received to his uſe. In one caſe, indeed, the queſtion did ariſe, though nothing was done upon it.

Gift v. Maſon, Mich. Vac. 1785, at Guildh.

It was an action by the inſurer againſt the owners, who in this caſe acted, without the intervention of a broker, for money had and received to his uſe. The caſe was decided upon other grounds, for which it will be mentioned more at length hereafter; but juſt before the verdict was given, it was objected, that this action would not lie for premiums againſt the *inſured themſelves*. Lord *Mansfield*, however, thought the objection came too late, and would not, at that ſtage of the cauſe, when the jury were ready to give their verdict, enter into it.

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In an action brought by the aſſignees of a broker againſt the aſſured, for premiums paid by the bankrupt to the underwriters, the queſtion came collaterally before the court: but I do not find that any point was reſerved, and the verdict was general. However, upon all the caſes it ſeems that the broker alone is the debtor to the underwriter.

Afry and others, Aſſignees of Milton v. Bland, Trin. Sitt. at Guildhall, 14 Geo. III.

It was an action brought by the plaintiffs, as aſſignees of *Milton*, who was a broker at *Newcaſtle*, and who had procured an inſurance to be effected by different perſons for the defendant. The declaration ſtated, that in conſideration that the bankrupt would procure an inſurance to be made on the ſhip *Jaſon*, and would procure ſix hundred pounds to be inſured thereon by good and ſufficient perſons, the defendant promiſed

miſed that he would pay the bankrupt the premiums, and a reaſonable ſum for his trouble. The firſt queſtion was, whether credit was given by the underwriters to the aſſured or to the broker, where the premium was not paid down at the time the aſſurance was made. *Milton*, the bankrupt, ſwore, that in *May* 1764, he was told by the underwriters that they ſhould look upon him as their debtor, and that they would have nothing to do with the inſured, which was conſidered at *Newcaſtle*, as the *London* practice: that from that time he had always acted on this plan, and had paid, ſince that time, one thouſand pounds to underwriters, which he had never received. His commmiſſion was five *per cent.* *London* inſurance brokers were then called, who ſaid, they underſtood the underwriters looked to them only; and that the underwriters did not once in ten times know who the inſured were; and that in caſe of failure, the underwriter came upon the effects of the broker; the broker upon thoſe of the inſured.

Lord *Mansfield* ſaid,—"The plaintiff's caſe is ſtronger than referring to the general uſage in *London*; for they act by a ſpecifick rule, which they ſuppoſe to be the rule in *London*: and if the uſage in *London* were doubtful, ſtill the plaintiffs would be entitled to recover."

There was a verdict for the plaintiffs.

Eighthly, The day, month, and year, on which the policy is executed. This inſertion ſeems very neceſſary, becauſe by comparing the date of the policy with the date of facts which happen afterwards, or are material to be proved, it will frequently appear, whether there is any reaſon to ſuſpect fraud or improper conduct on the part of the inſured. 1 Mag. 84.

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The ninth and laſt requiſite of a policy of inſurance is, that it be duly ſtamped.

By ſeveral acts of parliament paſſed in this and the preceding reigns, various duties had been impoſed upon policies

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of inſurance; but by an act paſſed in the 35th year of *Geo.* III. for the purpoſe of impoſing a new duty on marine inſurances, it was by the 24th ſection of the ſtatute poſitively declared, that all former duties on that ſpecies of inſurance ſhould, from and after the 5th day of *July* 1795, ceaſe and determine, and be no longer paid or payable. By the 2d ſection of the act it is declared that the duty thereby impoſed ſhall not extend, or be conſtrued to extend, to inſurances on lives or inſurances from loſſes by fire.

35 Geo. III. c. 63.

Section 1.

" For every ſkin, or piece of vellum or parchment, or ſheet " of paper, on which any inſurance upon any ſhip or ſhips, " goods or merchandize, or upon any other property, or in- " tereſt whereon inſurances may lawfully be made, ſhall be " engroſſed, written or printed, the ſtamp duties following " upon the ſums inſured; that is to ſay, Where the ſum to " be inſured ſhall amount to one hundred pounds a ſtamp " duty of two ſhillings and ſixpence, and ſo progreſſively for " every ſum of one hundred pounds inſured; and where the " ſum to be inſured ſhall not amount to one hundred pounds, " a like ſtamp duty of two ſhillings and ſixpence; and where " the ſum to be inſured ſhall exceed one hundred pounds, or " any progreſſive ſums of one hundred pounds each, by any " fractional part of one hundred pounds, a like ſtamp duty of " two ſhillings and ſixpence for each fractional part of one " hundred pounds: And that upon all and every inſurances " or inſurance, where the premium, or conſideration in the " nature of a premium, actually and *bonâ fide* paid, given, " or contracted for, ſhall not exceed the rate of ten ſhillings, " there ſhall be paid the following duties; (that is to ſay), " where the ſum ſo to be inſured ſhall amount to one hun- " dred pounds, a ſtamp duty of one ſhilling and three-pence, " and ſo progreſſively for every ſum of one hundred pounds " ſo inſured; and where the ſum ſo to be inſured ſhall not " amount to one hundred pounds, a like ſtamp duty of one " ſhilling and three-pence; and where the ſum ſo to be in- " ſured ſhall exceed one hundred pounds, or any progreſſive " ſums of one hundred pounds each, by any *fractional* part of " one hundred pounds, a like ſtamp duty of one ſhilling and " three-

" three-pence for ſuch fractional part of one hundred pounds; " which ſeveral duties ſhall be payable and paid by the aſſured " in ſuch inſurances reſpectively."

" Provided always, and be it further enacted, That upon Section 4. " all and every ſuch inſurances or inſurance, where the pre- " mium, or conſideration in the nature of a premium, actually " and *bonâ fide* paid, given, or contracted for, ſhall not ex- " ceed the rate of ten ſhillings *per centum* on the ſum inſured, " it ſhall be lawful, in all caſes where the ſum inſured ſhall " amount to two hundred pounds or upwards, to uſe ſtamps " of two ſhillings and ſixpence for every two hundred pounds " of the ſum inſured, inſtead of ſtamps of one ſhilling and " three-pence for every one hundred pounds of the like ſums " ſo inſured."

" And be it further enacted by the authority aforeſaid, Section 11. " That every contract or agreement which ſhall be made or " entered into for any inſurance, in reſpect whereof any " duty is by this act made payable, ſhall be engroſſed, " printed, or written, and ſhall be deemed and called, *A* " *Policy of Inſurance*; and that the premium, or conſideration " in the nature of a premium, paid, given, or contracted for, " upon ſuch inſurance, and the particular riſque or adventure " inſured againſt, together with the names of the ſubſcribers " and underwriters, and ſums inſured, ſhall be reſpectively " expreſſed or ſpecified in or upon ſuch policy, and in de- " fault thereof every ſuch inſurance ſhall be null and void to " all intents and purpoſes whatever."

" And be it further enacted by the authority aforeſaid, Section 12. " That no policy of inſurance upon any ſhip, or upon any " ſhare or intereſt therein, ſhall be made for any certain term " longer than twelve calendar months; and every policy " which ſhall be made for any longer term ſhall be null and " void to all intents and purpoſes."

The 10th ſection of the ſtatute provides for an allowance Section 10. to be made under certain circumſtances by the commiſſioners, where

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where the ſums inſured on homeward voyages ſhall be found to exceed the intereſt of the aſſured.

Section 13. The 13th ſection provides that nothing contained in the act ſhall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of inſurance, duly ſtamped as aforeſaid, after the ſame ſhall have been underwritten, or to require any additional ſtamp duty by reaſon of ſuch alteration, ſo that ſuch alteration be made before notice of the determination of the riſk originally inſured, and the premium or conſideration originally paid or contracted for ſhall exceed the rate of 10 *s. per cent.* on the ſum inſured, and ſo that the thing inſured ſhall remain the property of the ſame perſon or perſons, and ſo that ſuch alteration ſhall not prolong the term inſured beyond the period allowed by this act (ſee ſect. 12.) and ſo that no additional or further ſum ſhall be inſured by reaſon or means of ſuch alteration.

Section 15. By this ſection, a penalty of 500 *l.* is impoſed both on the perſons procuring, and the brokers effecting inſurances on

Section 16. policies not duly ſtamped; and the latter can neither demand their brokerage, nor the money expended for premiums; and by the 17th ſection, every underwriter ſubſcribing ſuch illegal policy is alſo liable to a like penalty of 500 *l.*

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Ord. of France, Article 69. Tit. Aſſurance. By the ordinances of *France*, and other maritime countries, all policies of inſurance muſt be regiſtered; but no ſuch regulation prevails in *England*, either by law, or in practice.

CHAPTER THE SECOND.

Of the Conſtruction of the Policy.

A POLICY of inſurance, being a contract of indemnity, and being only conſidered as a ſimple contract, muſt always be conſtrued, as nearly as poſſible, according to the intention of the contracting parties; and not according to the ſtrict and literal meaning of the words. The mercantile law, in this reſpect, is the ſame in every part of the world; for from the ſame premiſes, the ſound concluſions of reaſon and juſtice muſt ever be the ſame. Thus as the benefit of the inſured, and the advancement of trade, are the great objects of inſurance, policies are to be conſtrued largely, in order to attain thoſe ends: for it would be abſurd to ſuppoſe, that when the *end* is inſured, the ordinary and uſual means of attaining it can poſſibly be excluded; whatever, therefore, is done, by the maſter of the ſhip, in the uſual courſe, neceſſarily, *et ex juſtâ cauſâ*, although a loſs happen thereon, the underwriter ſhall be anſwerable.

1 Burr. 347. Roccus Not. 18.

1 Burr. 348.

But in the conſtruction of policies, no rule has been more frequently followed than the *uſage* of trade, with reſpect to the particular voyages or riſks to which the policy relates; and in the caſes about to be quoted in ſupport of theſe principles, it will be found, that the learned judges have always called in the uſage of trade, as the ground, upon which the conſtruction turns.

In ſtating the different caſes upon this ſubject, as the point is nearly the ſame in all, the order of time, in which they were determined, is that which will be purſued, in order to prevent confuſion.

The firſt to be mentioned is an anonymous caſe in the time of *James* the Second; but it is from a reporter of very good

Anonymous, Skinn. 243.

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good authority. A policy of insurance shall be construed to run until the ship shall have ended, and be discharged of her voyage; for arrival at the port, to which she was bound is not a discharge *till she is unloaded:* and it was so adjudged by the whole court, upon a demurrer.

But although this construction may be perfectly right, where the policy is general from *A.* to *B.* yet if it contain the words usually inserted "*and till the ship shall have moored* "*at anchor twenty-four hours in good safety,*" the underwriter is not liable for any loss, arising from seizure after she has been twenty-four hours in port; though such seizure was in consequence of an act of barratry of the master *during the voyage*, for, if it were extended beyond the time limited in the policy, it would be impossible to lay down any fixed rule, and all would be uncertainty and confusion.

Lockyer and others v. Offley, 1 Term Reports, p. 252.

This was decided in an action on a policy of insurance on the ship *Hope* from *Hamburgh* to *London*, subscribed by the defendant for two hundred pounds at one guinea *per cent.* At the trial before Mr. Justice *Buller*, at *Guildhall*, a verdict was found for the plaintiffs, subject to the opinion of the court, upon the following case: that the plaintiffs were interested in the ship to the amount of the sum insured. That in the course of the voyage, the master committed barratry by smuggling on his own account, by hovering and running brandy on shore in casks under sixty gallons. That on the first of *September* 1785, *the ship arrived in safety at her moorings in the river Thames, and remained there in safety till the twenty-seventh of the said month of September*, when she was seized by the revenue officers for the smuggling before stated. That about three weeks after the seisure, the plaintiffs informed the underwriters thereof; and that they would hold them liable on the policy. That on the twentieth of *October*, the plaintiffs presented a petition to the commissioners of his majesty's customs, in which they imputed all the blame (which was certainly the truth) to the captain, and praying that their vessel might be restored, on paying something to the seizing officer. The answer was, "that the prosecution must pro-

"ceed,

" ceed, as the ſhip had been guilty of a groſs violation of the " laws, but that the owners ſhould be at liberty to compound, " according to the rules of the Exchequer." That the ſhip was appraiſed at the ſum of three hundred and forty-five pounds, and by the courſe of the court of Exchequer, the ſhip would have been reſtored to the plaintiffs, upon the payment of two hundred and thirty pounds, beſides coſts and charges, which would altogether have amounted to three hundred and twenty-nine pounds nine ſhillings and ſeven-pence. That in *November*, a notice was indorſed on the policy, binding the underwriters for all coſts and charges expended about the recovery of the ſhip. That this was ſhewn to the underwriters, who refuſed to ſubſcribe it.

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This caſe was fully argued, in the abſence of Lord *Manſfield*, and the court having taken time to deliberate, Mr. Juſtice *Willes* pronounced their unanimous opinion. " There " is no doubt in this caſe, but that the maſter was guilty of " barratry, by ſmuggling on his own account, without the " privity of his owners. Many definitions of barratry are " to be found in the books, but perhaps this general one may " comprehend almoſt all the caſes: barratry is every ſpecies " of fraud or knavery in the maſter of the ſhip, by which " the freighters or owners are *injured*; and in this light a " criminal or wilful deviation is barratry, if it be without " their conſent. The general queſtion here is, whether, as " the loſs, which was occaſioned by the barratry of the maſter, " did not happen *during the continuance of the voyage*, the in- " ſurers are liable? I muſt own this appears to me to be a " novel queſtion, and not to have been decided by any former " determinations. Difficulties occur on both ſides in laying " down any rule. The firſt thing to be obſerved is, that the " policy, by the terms of it, is an undertaking *for a limited time*, " during the voyage from *Hamburgh* to *London*, *till the ſhip* " *has moored twenty-four hours in ſafety*; and the ſhip was not " actually ſeized till near a month afterwards. But it has " been ſaid that under the 24th of *George* the Third, chap. " 47. and the exciſe laws, the forfeiture attaches the moment " the act is done, and that the barratry was committed *during*

" *the*

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" *the voyage.* It may be ſo as to ſome purpoſes, as to prevent " intermediate alterations or incumbrances; but I think the " *actual* property is not altered *till after the ſeizure*, though " it may be before condemnation. I will put this caſe; ſup- " poſe, before the ſeizure of the ſhip, ſhe had gone another " voyage, and on her return had been ſeized, would the
[33] " crown be entitled to an account of her earnings, after de- " ducting the expences of the outfit? ſurely not. Till the " ſeizure, it was not certain that the officers of the crown " knew of the illicit trade carried on by the maſter, or whe- " ther they would take advantage of the forfeiture. It would " be a dangerous doctrine to lay down, that the inſurer " ſhould, in all caſes, be liable to remote conſequential da- " mages. This has been compared to a death's wound re- " ceived during the voyage, which ſubjected the ſhip to a " ſubſequent loſs. To this point the caſe of *Meretony* v.
Eaſter 23 Geo. III. B. R. " *Dunlop*, ſeems very material. That was an inſurance on a " ſhip for ſix months; and three days before the expiration " of the time, ſhe received her death's wound, but by pump- " ing, was kept afloat, till three days after the time: there " the verdict, under the direction of Lord *Mansfield*, was " given for the inſurer; and it was afterwards confirmed by " the court. I will put another caſe: ſuppoſe an inſurance " upon a man's life for a year, and ſome ſhort time before " the expiration of the term, he receives a mortal wound, of " which he dies after the year, the inſurer would not be
Vide poſt, c. 5. " liable. The caſe of *Vallejo* v. *Wheeler* was cited for the " plaintiff, but that does not conclude this queſtion, for there " the ſhip was loſt *during the voyage*. It was alſo argued, " that this ſhip, even in the hands of a fair purchaſer, would " be liable to the forfeiture. I do not know that it ever has " been ſo decided; it may depend on circumſtances, ſuch as " length of poſſeſſion, laches in ſeizing, or other matters. " But ſuppoſe the law to be ſo, it does not follow from thence, " that though the ſhip *is always liable to confiſcation*, that the " inſurer at any diſtance of time is anſwerable for the loſs, " under a limited undertaking. And this brings me to that " part of the caſe, which weighs moſt with the court, in fa- " vour of the defendant, and to which it does not appear to

" us, that any ſatisfactory anſwer has been given. It was " agreed in the argument, that the cuſtom-houſe officers " might ſeize for the forfeiture within three years after the " fact committed; and that the attorney-general might file " an information, at any time whilſt the ſhip was in being. " Is the inſurer during all this time to continue liable? " Suppoſe the ſhip had gone ſeveral voyages afterwards; " and ſuppoſe a partial loſs paid, and the underwriter's name [34] " ſtruck off, ſhall an action be afterwards brought upon the " policy? His accounts could never be ſettled, nor could he " be finally diſcharged, whilſt the ſhip was in exiſtence; " ſuch a poſition would be monſtrous, and attended with in- " finite inconvenience. There muſt be ſome certain and " reaſonable limitation in point of time laid down by the " court, when the inſurer ſhall be releaſed from his engage- " ment. If he be liable for a month, he may be for a year, " and ſo on. We all think that the law of inſurances would " be left unſettled, and in much confuſion, if any other time " were allowed, than that preſcribed by the policy, namely, " *the continuance of the voyage, and the ſhip's mooring twenty-* " *four hours in ſafety.*" Judgment for the defendant.

In an action upon a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies*, warranted to depart with convoy, the declaration ſhewed, that the ſhip went from *London* to the *Downs*, and from thence with convoy, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clauſe, " warranted to depart with convoy" muſt be conſtrued according to the uſage among merchants, that is, from ſuch place where convoys are to be had, *as the Downs.* Lethulier's Caſe, 2 Salk. 443.

It is true, Lord Chief Juſtice *Holt* differed from the reſt of the court, being of opinion that it was no part of the law of merchants to take convoy in the *Downs*. His lordſhip's opinion, however, although it is one of the firſt legal authorities, is certainly contradicted by practice, it being almoſt the invariable See Gordon v. Morley, poſt, p. 36.

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invariable cuſtom for the convoy to meet the merchant ſhips only in the *Downs*.

Bond v. Gonſales, 2 Salk. 445.

Caſe upon a policy of inſurance, which was to inſure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The caſe was, the galley ſet ſail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an admiral. After a ſtay of nine weeks, they ſet ſail from the *Texel*; the galley was ſeparated in a ſtorm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds ſalvage. It was ruled by *Holt*, Chief Juſtice, that the voyage ought to be according to *uſage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made), there was no convoy for ſhips directly from *Bremen* to *London*. Verdict for the plaintiff.

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Waples v. Eames, 2 Stra. 1243.

The ſhip *Succeſs* was inſured "*at and from Leghorn to the* "*port of London, and till there moored twenty-four hours in* "*good ſafety.*" She arrived the 8th of *July* at *Freſh Wharf* and moored, but was the ſame day ſerved with an order to go back to the *Hope* to perform a fourteen days quarantine. The men upon this deſerted her, and on the 12th of the month the captain applied to be excuſed going back, which petition was adjourned to the twenty-eighth, when the regency ordered her back; and on the thirtieth, ſhe went back, performed the quarantine, and then ſent up for orders to ſell the goods; but before ſhe returned, the ſhip was burnt on the twenty-third of *Auguſt*, and now the queſtion was, whether the inſurer was liable?

Lord Chief Juſtice *Lee* ruled, that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there in *good ſafety*, which muſt mean the opportunity of unloading and diſcharging; whereas here ſhe was arreſted within the

twenty-four hours, and the hands having deſerted, and the regency taken time to conſider the petition, there was no default in the maſter or owners: and it was proved that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

So where the ſhip *Hercules* was inſured from *Bilboa* to *Rouen*, and till 24 hours moored in ſafety there. The ſhip arrived, an embargo having been previouſly laid on all *Engliſh* veſſels in that port. The captain went on ſhore the day he arrived, and the next day the embargo was laid on his ſhip.—He was afterwards permitted to land his cargo, which he delivered to his conſignees, but the ſhip was *detained as a prize*, and the captain and crew allowed ſubſiſtence as priſoners of war, from the time of their arrival.

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Minett v. Anderſon, Peake 211. Sitt. after Hill. 34 Geo. III.

Lord *Kenyon*.—"She was as much within the power of the enemy, as if a guard had been put on board the moment ſhe arrived. She could not be ſaid to be 24 hours, or a minute, *moored in ſafety*, as far as relates to theſe plaintiffs, for immediately on her entering the port, ſhe was to all intents and purpoſes captured by the French." Verdict for the plaintiffs.

But where a ſhip had arrived at the wharf, where ſhe intended to unload, on the 12th *January*, and was laid on the outſide of the tier, there being no room to lay her in the inſide; where the ſails were unbent, top-maſts ſtruck, three anchors out, and ſhe was alſo laſhed to another ſhip, and ſo continued till the 19th, when ſeveral ſhips and a quantity of ice drove athwart her ſtern, forced her adrift, and ſhe was wholly loſt. Lord *Kenyon* was of opinion that ſhe was completely moored upon the 12th, and as the accident did not happen till above 24 hours after that time, the plaintiff was nonſuited.

Angerſtein v. Bell, Sittings at Guildhall after Trin. 1795.

In an inſurance upon *freight*, if an accident happens to the ſhip before any goods are put on board, which prevents her from ſailing, the inſured upon the policy cannot recover

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the freight which he would have begun to earn, if the goods had been ſhipped. The circumſtances of the caſe were theſe:

Tonge v. Watts, 2 Stra. 1251.

The plaintiff inſured *on ſhip and freight*, at and from *Jamaica* to *Briſtol*. A cargo was ready to put on board: but the ſhip being careening, in order for the voyage, a [36] ſudden tempeſt aroſe, and ſhe and many others were loſt. The rigging and parts of her were recovered and ſold, and the defendant paid into court as much as, upon an average, he was liable to for the loſs of the ſhip: but the plaintiff inſiſted to be allowed ſix hundred pounds for the freight the ſhip *would have earned* in the voyage, if the accident had not happened. But as the goods were not actually on board, ſo as to make the plaintiff's right to freight commence; Lord Chief Juſtice *Lee* held, he could not be allowed it, and he was nonſuited.

But if the policy be a valued policy, and part of the cargo be on board when ſuch accident happens, the reſt being ready to be ſhipped, the inſured may recover to the whole amount.

Montgomery v. Eggington, 3 Term R. 362.

This was ſo decided in an action brought by the aſſured on a policy on freight, valued at fifteen hundred pounds: In fact only five hundred pounds worth of freight was on board when the ſhip was driven from her moorings and loſt: but goods to the amount of the reſt of the freight were ready to be ſhipped, and were lying on the quay for that purpoſe at the time.

Lord *Kenyon* Chief Juſtice, before whom the cauſe was tried, told the jury, that the queſtion for their conſideration was, whether this was a mere colourable inſurance and a gaming policy, or whether it was a *bonâ fide* tranſaction: if the latter, the aſſured was entitled to recover for the whole value in the policy. The jury found the whole ſum. The defendant's counſel obtained a rule for a new trial, which he afterwards abandoned, the court being ſtrongly of opinion againſt him.

So

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So alſo in an *open* policy on freight, *at and from London and Teneriffe to any of the Weſt India iſlands*, (*Jamaica* excepted), the underwriters were held liable to pay the inſurance, though the ſhip ſailed from *London* in ballaſt, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ſhip was under a charter party *to depart out of the river Thames, and proceed to Teneriffe, and there to load and receive on board from the freighters* 500 *pipes of wine, to be delivered in the Weſt Indies, for the freight of which* 500 *pipes the freighters covenanted to pay* 35 *s. per pipe;* the court held that the inſtant the ſhip departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover. At the trial, the plaintiff had obtained a verdict, and the caſe was afterwards brought before the court upon a motion to enter a nonſuit. After argument at the bar,

Thompſon v. Taylor, 6 Term R. 478.

Lord *Kenyon* ſaid—"When this caſe came on at *niſi prius*, I thought the plaintiff was not entitled to recover; becauſe I conſidered it as ſimilar in every reſpect to that of *Tonge* v. *Watts*; and had it been ſo, my judgment now would have gone with that caſe. But this caſe depends upon its own peculiar circumſtances. It is admitted, that if this contract had an inception, that the right to freight then commenced, and the policy attached. Now by the charter party there was an inception of the contract, by the departure from the *Thames;* for the covenant in the charter party was to go from the port of *London*. In the caſe from *Strange*, the inception of the contract would have been by taking the goods on board, which not being done, the inſurance did not attach. In the caſe of *Montgomery* v. *Egginton*, there was an inception of the contract, and plaintiff recovered. The caſe in *Strange* importantly differs from this; but I am now completely ſatisfied, though the caſe is new, that the plaintiff ought to recover."

Mr. Juſtice *Groſe*.—"In this caſe the freight begins to run in conſequence of the ſhip's departure from *London;* the plaintiff therefore has an intereſt in the voyage. But in *Tonge* v. *Watts*,

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v. *Watts*, the voyage was not begun, nor were the goods on board."

Mr. Juſtice *Lawrence*.—" I think this plaintiff had an inſurable intereſt; for it ſeems to me equally as ſtrong an intereſt as the profits to ariſe from a cargo of molaſſes, which have been held to be an inſurable intereſt. It is ſaid that the plaintiff had a mere right of action againſt the freighter; and if he had not provided a cargo, though the plaintiff might recover againſt the freighter for breach of contract, yet he could not recover againſt the underwriters. It is true an inſurance on freight could not have been recovered, if the ſhip had proceeded to the *Weſt Indies* without one. But here, by a peril in the policy, the aſſured is prevented from earning a ſpecifick freight; and therefore the rule for entering a nonſuit muſt be diſcharged."

See poſt, 267.

Gordon v. Morley, Campbell v. Bordieu, 2 Sira. 1265.

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The inſurers reſiſted the demand of indemnity, alledging, that as there was a *French* war, the ſhip ſhould not have ventured through the *Channel*, but have waited for occaſional convoy. Lord Chief Juſtice *Lee*, however, was of opinion, that the ſhip was to be conſidered as under the defendant's inſurance to a place of general rendezvous, according to the interpretation of the words, *warranted to depart with convoy*, *Salk.* 443, 445, and if the parties meant to vary the inſurance from what is *commonly* underſtood, they ſhould have ſtated it. Two ſpecial juries of merchants found their verdicts agreeably to that direction.

Vide ſupra. [37]

Motteux and others, v. the Gov. and Comp. of London Aſſur. 1 Atk. 545.

This caſe has already been mentioned, on account of an alteration made in the policy after the time of underwriting; it ſhall now, however, be conſidered wholly independant of that circumſtance. It was a bill filed in the court of Chancery, which ſtated, that the ſhip *Eyles*, late in the *Eaſt India* Company's ſervice, was, in the year 1732, at *Bengal*, at

which time the owner employed *I. H.* to inſure the ſhip in the *London* Aſſurance Office for five hundred pounds. The adventure thereon was to commence *from her arrival at Fort Saint George*, and thence to continue till the ſaid ſhip ſhould arrive in *London*, and that it ſhould be lawful for the ſaid ſhip, in the ſaid voyage, to ſtay at any ports or places without prejudice, and that the ſhip was, and ſhould be rated *at intereſt or no intereſt*, without farther account: in conſideration whereof, *I. H.* paid fifteen pounds premium. *The Eyles* came to *Fort Saint George* in *February* 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, *&c.* ſhe ſailed to *Bengal* to be refitted, and after being ſheathed, in her return upon her homeward-bound voyage, ſhe ſtruck upon the *Engilee* ſands and was loſt. Evidence was read on the part of the plaintiffs to prove, that *Bengal* was the moſt proper place to refit, and that ſhe went thither for that reaſon; that this was a voyage of neceſſity, and not a trading voyage, for ſhe took nothing on board, but water, proviſion, and ballaſt.

Lord Chancellor *Hardwicke*.—"As to the queſtion, whether there has been a breach, or, in other terms, a loſs, within the meaning of this policy, the general principles laid down by the plaintiff's counſel are right, that ſtreſs of weather, and the danger of proceeding on a voyage, when a ſhip is in a decayed condition, are to be conſidered. In ſuch a caſe, if ſhe went to the neareſt place, I ſhould conſider it equally the ſame as if ſhe had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumſtance, that the governor ordered the lading to be taken out, to ſhew the neceſſity of the ſhip's being repaired, but there is not a ſyllable of proof why ſhe might not have been equally well repaired at *Fort Saint George*. There is one part of this caſe which diſtinguiſhes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ſhip was loſt in *July* 1733, three weeks before

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the time of making this policy, ſo that clearly the ſhip was not at *Fort Saint George* at the time the agreement was made; and therefore it is a material queſtion, whether it comes within the agreement." His Lordſhip directed an iſſue to try, whether the loſs in *July* 1733, was a loſs during the voyage, and according to the adventure agreed upon; which iſſue was afterwards found for the plaintiffs upon a trial in the Common Pleas.

1 Atk. 548.

In an action upon a policy of inſurance, before Lord Chief Juſtice *Hardwicke*, it was held, that the words "at and from *Bengal* to *England*," meant *the firſt arrival* at *Bengal*; and it was agreed, that when ſuch words are uſed in policies, *firſt arrival* is always implied and underſtood.

Chitty v. Selwin, 2 Atk. 359.

It has likewiſe been held, that when a ſhip is inſured *at and from a place*, and it arrives at that place, as long as the ſhip is preparing for the voyage upon which it is inſured, the inſurer is liable: but if all thoughts of the voyage be laid aſide, and the ſhip lie there five, ſix, or ſeven years, with the owner's privity, it ſhall never be ſaid the inſurer is liable; for it would be to ſubject him to the whim and caprice of the owner.

Camden v. Cowley, 1 Black. 417.

This was an action on a policy of inſurance on a ſhip, at and from *Jamaica* to *London*. The ſhip had alſo been inſured from *London* to *Jamaica* generally, and was loſt in coaſting the iſland, after ſhe had touched for ſome days at one port there, but before ſhe had delivered all her outward-bound cargo at the other ports of the iſland. This was an action on the homeward policy; and in order to ſhew when the homeward-bound riſk commenced, it was neceſſary to ſhew at what time the outward-bound riſk determined; and the jury, which was ſpecial, after an examination of merchants as to the cuſtom, by their verdict decided, that the outward riſk ended when the ſhip had moored in any port of the iſland, and did not continue till ſhe came to the laſt port of delivery.

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In

In the *Trinity* term following, a motion was made for a new trial, but it was refuſed; becauſe it had been thoroughly tried and no new light could be thrown upon it, although Lord *Mansfield* ſaid, the inclination of his opinion at the trial was the contrary way. Mr. Juſtice *Wilmot* thought, the conſtruction put upon the policy by the jury was the right one. 1 Black. 418.

In a ſimilar caſe Lord *Mansfield* laid down the ſame doctrine to the jury, namely, that the outward riſk *upon the ſhip* ended twenty-four hours after its arrival in the firſt port of the iſland to which it was deſtined: but that the outward policy *upon goods* continued till they were landed. Barraſs v. The London Aſſurance, Sittings after Hilary 1782, at Guildhall.

The doctrine contained in the two laſt caſes has met with material confirmation in a very modern deciſion. It was an action upon a policy of aſſurance on *the ſhip Palliſer*, and *on goods* on board thereof, on a voyage *at and from Georgia to Jamaica*. The ſhip arrived in *Montego Bay*, and *moored at anchor*, and there alſo the agent of plaintiff ſold and *delivered* the greateſt part of the cargo to Meſſrs. *Adams* and *Hatton* merchants there. The captain then entered into a charter party with *Adams* and *Hatton*, to proceed from thence to *St. Anne's*, and there to take in a cargo for *London*. After unloading the greateſt part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed that the remainder of the cargo (which was lumber) ſhould be carried as ballaſt to *St. Anne's*, and accordingly the veſſel, after taking in ſome fuſtick, proceeded towards *St. Anne's*, but was wrecked and never arrived there. For the plaintiff it was urged, that in ſuch an inſurance, the ſhip might go from port to port; and that, at all events, the goods were protected by the policy, *till they were all diſcharged and ſafely landed*. Leigh v. Mather, Sittings at Guildhall, after Michaelmas Term, 1795.

Lord *Kenyon* was clearly of opinion, and was confirmed in that opinion by a Special Jury, to whom his Lordſhip particularly referred upon this occaſion, that the riſk *on the ſhip* ceaſed, *after ſhe had been moored at anchor twenty-four hours* in the *firſt port* of the iſland, *for the purpoſe of unloading*; and

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the facts diſcloſed in this caſe having manifeſted that *Montego Bay* was alſo the original deſtination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, *the loſs of the goods* cannot be recovered under this policy of inſurance. A ſhip inſured to *Jamaica generally* cannot be permitted to go round the whole iſland, from port to port, for the purpoſe of unloading her cargo, eſpecially where, as in this caſe, the owner of ſhip and goods is the ſame perſon. The plaintiff was nonſuited.

But the great and leading caſes, upon queſtions of conſtruction, are two, *Tiernay* v. *Etherington*, and *Pelly* v. the *Royal Exchange* Aſſurance company; the former determined by Lord Chief Juſtice *Lee*, and the latter by Lord *Mansfield*. In theſe caſes, the principles, which are to be obſerved in the conſtruction of policies, are ſo fully conſidered, and the application of them to the particular circumſtances of the different caſes is made with ſo much accuracy and perſpicuity, that they are to be regarded as the pole ſtar to direct our enquiries upon all ſimilar occaſions.

Tiernay v. Etherington, before Lee Chief Juſtice, 5 March 1743, 1 Burr. 348.

The firſt of theſe cauſes was an action upon a policy of inſurance "on goods, in a *Dutch* ſhip, from *Malaga to Gibraltar*, and at and from thence to *England* and *Holland*, both, or either: on goods, as hereunder agreed, beginning the adventure from the loading, and to continue till the ſhip and goods be arrived at *England* or *Holland*, and there ſafely landed." The agreement was, "that upon the arrival of the ſhip at *Gibraltar*, the goods might be unloaded, and re-ſhipped in one or more *Britiſh* ſhip or ſhips for *England* and *Holland*, and to return one *per cent.* if diſcharged in *England*." It appeared in evidence, that when the ſhip came to *Gibraltar*, the goods were unloaded, and put into a *ſtore ſhip*, (which it was proved was always conſidered as a warehouſe), and that there was then no *Britiſh* ſhip there. Two days after the goods were put into the ſtore ſhip, they were loſt in a ſtorm. The queſtion was, whether this was a loſs within the conſtruction of the policy.

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Lee,

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Lee, Chief Juſtice.—"It is certain, that in the conſtruction of policies, the *ſtrictum jus* or *apex juris*, is not to be laid hold of: but they are to be conſtrued largely, for the benefit of trade, and for the inſured. Now it ſeems to be a ſtrict conſtruction, to confine this inſurance only to the unloading and reſhipping, and the accidents attending that act. The conſtruction ſhould be according to the courſe of trade in this place; and this appears to be the uſual mode of unloading and reſhipping in that place, *viz.* that when there is no *Britiſh* ſhip there, then the goods are kept in ſtore ſhips. Where there is an inſurance on goods on board ſuch a ſhip, that inſurance extends to the carrying the goods to ſhore in a boat. So, if an inſurance be of goods to ſuch a city, and the goods are brought in ſafety to ſuch a port, though diſtant from the city, that is a compliance with the policy; if that be the uſual place to which the ſhips come. Therefore, as here is a liberty given of unloading and reſhipping, it muſt be taken to be an inſuring under ſuch methods as are proper for unloading and reſhipping. There is no neglect on the part of the inſured, for the goods were brought into port the nineteenth, and were loſt the twenty-ſecond of *November*. This manner of unloading and reſhipping is to be conſidered as the neceſſary means of attaining that, which was intended by the policy; and ſeems to be the ſame, as if it had happened in the act of unſhipping from one ſhip into another. And as this is the known courſe of the trade, it ſeems extraordinary, if it was not intended. This is not to be conſidered as a ſuſpenſion of the policy; for as the policy would extend to a loſs, happening in the unloading and reſhipping from one ſhip to another, ſo any means to attain that end come within the meaning of the policy." The plaintiff had a verdict.

Afterwards a new trial was moved for; but it was refuſed by *Lee* Chief Juſtice, Mr. Juſtice *Chapple*, and Mr. Juſtice *Denſon*, againſt the opinion of Mr. Juſtice *Wright*. Eaſter Term, 1743.

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The next of theſe cauſes came before the court upon a caſe reſerved for their opinion, after a trial and verdict for the plaintiff, Pelly v. The Governor and Comp. of the

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plaintiff, at *Guildhall*, before Lord *Mansfield*. It was an action of covenant upon a policy of insurance.

Royal Exchange Assurance, 1 Burr. 341.

The case states, that the plaintiff, being part owner of the ship *Onslow*, an *East India* ship, then lying in the *Thames*, and bound on a voyage to *China*, and back again to *London*, insured it "at and from *London*, to any ports or places beyond "the *Cape of Good Hope*, and back to *London*, free from ave-"rage under ten *per cent.* upon the body, tackle, apparel, "ordnance, munition, artillery, boat, and other furniture "of and in the said ship: beginning the adventure upon the "the said ship from and immediately following the date of "the policy, and so to continue and endure until the ship "shall be arrived as above, and there anchored twenty-"four hours in good safety." The perils mentioned in the policy were the common perils, *viz.* "of the seas, men of "war, fire, *&c.*" The ship arrived in the river *Canton*, in *China*, where she was to stay to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture, were by the captain's order taken out of her, and put into a warehouse, or storehouse, called a bank-saul, built for that purpose on a sand bank, or small island, lying in the said river, near one of the banks called *Bank-saul Island*, in order to be there repaired, kept dry, and preserved, till the ship should be heeled, cleaned and refitted. Some time after this, a fire broke out in the bank-saul, belonging to a *Swedish* ship, and communicated itself to another bank-saul, and from thence to that belonging to the *Onslow*, and consumed the same, together with all the sails, yards, *&c.* belonging to the *Onslow* that were therein. The case states further, that it was the *universal, and well-known usage*, and has been so for a great number of years, for all *European* ships, which go a *China* voyage, except *Dutch* ships, (who for some years past have been denied this privilege by the *Chinese*, and who look upon such denial as a great loss), when they arrive near this *Bank-saul Island*, in the river *Canton*, to unrig the ships, and to take out their sails, yards, tackle, cables, rigging, apparel, and other furniture; and to put them on shore in a bank-saul, built for that purpose on the

the ſaid iſland (in the manner that had been done by the captain of the *Onſlow*, on the preſent occaſion) in order to be repaired, kept dry, and preſerved, until the ſhips ſhould be heeled, cleaned, and refitted. The caſe adds, that ſo doing is prudent, and for the common and general benefit of the owners of the ſhip, the inſurers, and inſured, and all perſons concerned in the ſafety of the ſhip. The ſhip arrived from her ſaid voyage in the *Thames*, having been again rigged, and put in the beſt condition, the nature of the place and circumſtances of affairs would permit. The queſtion for the opinion of the court was, whether the inſurers are liable to anſwer for this loſs, ſo happening upon the bank-ſaul, within the intent and meaning of this policy.

The court, after a ſolemn argument, took time to conſider the queſtion, and then Lord *Mansfield* delivered the unanimous opinion of the court for the plaintiff.

Lord *Mansfield*,—"By the expreſs words of the policy, the defendants have inſured the tackle, apparel, and other furniture of the *Onſlow*, from *fire* during the whole time of her voyage, until her return in ſafety to *London*, without any reſtriction. Her tackle, apparel, and furniture, were inevitably burnt in *China*, during the voyage, before her return to *London*. The event then, which has happened, is a loſs within the general words of the policy; and it is incumbent upon the defendant to ſhew, from the manner, in which this misfortune happened, or from other circumſtances, that it ought to be conſtrued a peril, which they did not undertake to bear. If the chance be varied, or the voyage altered, by the fault of the owner or maſter of the ſhip, the inſurer ceaſes to be liable; becauſe he is only underſtood to engage that the thing ſhall be done ſafe from fortuitous dangers, provided due means are uſed by the trader to attain that end. But the maſter is not in fault, if what he did was done in the uſual courſe, and for juſt reaſons. The inſurer, in eſtimating the price at which he is willing to indemnify the trader againſt all riſks, muſt have under his conſideration the nature of the voyage to be performed, and the uſual courſe

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and manner of doing it. Every thing done in the uſual courſe muſt have been foreſeen, and in contemplation at the time he engaged: he took the riſk, upon a ſuppoſition, that what was uſual or neceſſary ſhould be done. In general, what is

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uſually done by ſuch a ſhip, with ſuch a cargo, in ſuch a voyage, is underſtood to be referred to by every policy, and to make a part of it, as much as if it were expreſſed. The uſage, being foreſeen, is rather allowed to be done, than what is left to the maſter's diſcretion, upon unforeſeen events: yet if the maſter, *ex juſtâ cauſâ*, go out of the way, the inſurance continues. Upon theſe principles it is difficult to frame a queſtion, which can ariſe out of this caſe, as ſtated. The only objection is, that they were burnt in a bank-ſaul, and not in the ſhip; upon land, not at ſea, or upon water: and being appertinent to the ſhip, loſſes and dangers aſhore could not be included. The anſwer is obvious: Firſt, the words make no ſuch diſtinction: Secondly, the intent makes no ſuch diſtinction. Many accidents might happen at land, even to the ſhip. Suppoſe a hurricane to drive it a mile on ſhore; or an earthquake may have a like effect; ſuppoſe the ſhip to be burnt in a dry dock, or ſuppoſe accidents to happen to the tackle upon land, taken from the ſhip, while accidentally and occaſionally refitting, as on account of a hole in its bottom, or other miſchance; theſe are all poſſible caſes. But what might ariſe from an accidental repair of the ſhip, is not near ſo ſtrong, as a certain, neceſſary conſequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ſhip muſt be heeled, cleaned, and refitted, in the river of *Canton*: they knew that the tackle would then be put in the bank-ſaul: they knew it was for the ſafety of the ſhip, and prudent that they ſhould be put there. Had it been an accidental neceſſity of refitting, the maſter might have juſtified taking them out of the ſhip, *ex juſtâ cauſâ*: but deſcribing the voyage is an expreſs reference to the uſual manner of making it, as much as if every circumſtance was mentioned. Was the chance varied by the fault of the maſter? It is impoſſible to impute any fault to him. Is this like a deviation? No: 'tis *ex juſtâ cauſâ*, which always excuſes

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Had the inſurers in this caſe been aſked, whether the tackle ſhould be put in the bank-ſaul, they muſt, for their own ſakes, have inſiſted that it ſhould. They would have had reaſon to complain, if from their not being put there a miſfortune had happened. In ſuch a caſe, the maſter would have been to blame, and by his fault would have varied the chance. They have taken a price for ſtanding in the plaintiff's place, as to any loſſes he might ſuſtain in performing the ſeveral parts of the voyage, of which this was known and intended to be one. Therefore, we are all of opinion, that in every light, and in every view of this caſe, in reaſon and juſtice, and within the words, intent, and meaning, of this policy, and within the view and contemplation of the parties to the contract, the inſurers are liable to anſwer for this loſs.

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This caſe has ſince been confirmed by Lord *Kenyon* and the whole court of King's Bench.

Brough v. Whitmore, 4 Term R. 206. See poſt, p. 56. for another point.

So alſo in another caſe, the ſame principles were adhered to, and the ſame rule of deciſion was adopted. The inſurance was upon the ſhips the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port, or ports, of diſcharge, on the coaſt of *Labrador*, with leave to touch at *Newfoundland*, and upon any kinds of goods and merchandizes; and alſo on the ſhips, till they ſhould be arrived at their port of diſcharge, and ſhould have moored at anchor *twenty-four hours, and on the goods until the ſame ſhould be there diſcharged and ſafely landed.* By a clauſe in the policy, money advanced to the fiſhermen was inſured. The *Anne* arrived ſafe on the coaſt of *Labrador* on the 22d of *June*, and the *Hope* on the 14th of *July*, 1778. From the time of their arrival, the crews were employed in fiſhing, and had taken out none of their cargoes, except at leiſure hours (partly on *Sundays*) ſuch things as were immediately wanted. On the 13th of *Auguſt*, an *American* privateer entered the harbour and took both the veſſels, there being at that time nobody on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unneceſſary delay in unloading the cargoes,

Noble and others v. Kennoway, Dougl. 492.

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goes, in conſequence of which they had been expoſed to capture, and that the underwriters ought not to be liable for what had happened from the negligence of the inſured. The plaintiffs reſted their caſe on the words of the policy, and the uſage of the trade. They called the captain of the *Anne*, who ſwore, that he had been the ſame voyage three times in the three laſt years, and that they had proceeded in the ſame manner during each of the voyages; that he did not think the plaintiffs had warehouſes ſufficient to have held the goods if they had been landed; and that there were no ſettlements on the coaſt of *Labrador*, but thoſe belonging to the plain-
[45] tiffs. One of the ſailors ſwore to the ſame effect. The plaintiffs then called one *French*, to prove the cuſtom of the *Newfoundland* trade. This evidence was objected to; but Lord *Mansfield* admitted it, and the witneſs ſwore, that, in the *Newfoundland* trade, it is cuſtomary to keep their goods on board ſeveral months, and that ſometimes they have part of their homeward cargo of fiſh, and part of their old cargo on board, at the ſame time. That the firſt object is to catch fiſh, and they unload only at times when they cannot fiſh. The old cargo being chiefly ſalt and proviſions, it is taken out gradually for curing the fiſh, and for conſumption. The teſtimony of this witneſs was confirmed by one *Newman*. Neither *Newman* nor *French* had been at *Labrador*. Mr. *Hunter* was then called, who proved, that ſome years ſince, he uſed to ſend veſſels of his own, and alſo chartered veſſels to *Labrador*, and that it was uſual, in chartering veſſels, to ſtipulate, that they ſhould have ſixty days allowed for diſcharging. That he apprehended they were oftentimes longer in fact, and that it was not ſo eaſy to diſcharge a cargo at *Labrador*, as at *Newfoundland*. Upon this evidence a verdict was found for the plaintiffs, and in the ſubſequent term the defendant moved to ſet it aſide, which was not granted.

Lord *Mansfield*.—"The trade of fiſhing on the coaſt of *Newfoundland*, eſpecially from the weſt of *England*, has been known and practiſed for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The inſurance here is on the ſhips, and *on the goods till landed*. The

defendant

defendant ſays, the plaintiffs have been guilty of an unreaſonable delay in landing. That queſtion was to be tried by the jury, and could only be decided, by knowing the uſual practice of the trade. *Every underwriter is preſumed to be acquainted with the practice of the trade he inſures, and, whether it is recently eſtabliſhed or not.* If he does not know it, he ought to inform himſelf. It is no matter if the uſage has been only for a year. This trade has exiſted, and has been conducted in the ſame manner for three years. It is well known, that the fiſhery is the object of the voyage, and the ſame ſort of fiſhing is carried on in the ſame way at *Newfoundland*. I ſtill think the evidence on that ſubject was properly admitted, to ſhew the nature of the trade. The point is not analogous to a common law cuſtom."

Mr. Juſtice *Buller*.—" I think there was ſufficient evi- [46]
dence, without calling in aid the uſage of the *Newfoundland* trade; for it appeared, on the face of the policy, that the fiſhery was the purpoſe of the voyage: but I think the evidence objected to was properly admitted. If it can be ſhewn, that the time would have been reaſonable in one place, that is a degree of evidence to prove, that it was ſo in another. The effect of ſuch evidence may be taken off by proof of different circumſtances. It is very true, that the cuſtom of one manor is no evidence of the cuſtom of another; that has been determined in many caſes: but the point here is very different; it is a queſtion concerning the nature of a particular branch of trade."

The rule was diſcharged.

Although the deciſions in all the above cauſes, notwithſtanding the vaſt variety of circumſtances that are to be found in them, are ſo uniform in principle; and although we find, that the learned judges make a conſtant reference to the uſage of trade; yet in no inſtance whatever has this been ſo apparent as in the caſes of inſurance upon *Eaſt India* voyages, in which the inſurers have been held liable, not only for events which may poſſibly happen from the port of diſcharge

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diſcharge to that of delivery; but alſo for all intermediate or country voyages, upon which the ſhip may be diſpatched by the order of the council of any of the *Eaſt India* Company's ſettlements abroad.

It is not that, in theſe caſes, the judges have given a greater latitude to the uſage of trade, than in any other; but becauſe from the great variety of caſes that have ariſen upon the ſubject, the uſage with regard to the *Eaſt India* voyage is more notorious, and better eſtabliſhed than in thoſe where the queſtion has but ſeldom occurred. The grounds and reaſons of ſuch deciſions ſeem to have been the terms in which all the printed charter parties of the *Eaſt India* Company are conceived. By thoſe charter parties, liberty is given to prolong the ſhip's ſtay for a year; beſides which, it is very common by a new agreement to detain her a year longer: and the longer a ſhip is kept, it is the more beneficial to the owners. The words of the policy, too, are adapted to this uſage, being without limitation of time or
[47] place, and without any reference to the firſt voyage particularly mentioned in the charter party. Theſe charter parties, being printed, are matter of public notoriety; and are ſo generally and univerſally known, or may be ſo, by an enquiry at the *India Houſe*, that the chance of her ſtay is always one of the riſks inſured: and both the inſured and inſurer muſt be ſuppoſed to be fully apprized and ſufficiently conuſant of it. Indeed, the underſtanding of the policy depends ſo much on the courſe and uſage of the *Eaſt India* trade, that it ſeems to be contradictory to the policy to ſay, that the underwriter did not underwrite for a country voyage.

All theſe principles were fully laid down by Lord *Manſfield* in a very few years after he took upon him the adminiſtration of juſtice in this country; and they have been frequently recognized, and invariably purſued in a multitude of deciſions upon ſuch policies ſince that time. The learned chief juſtice, when he laid down theſe rules, as the ground of his then opinion, and as the guide of future deciſions, ſaid,

id, he did ſo, becauſe the court eſteemed this to be the moſt convenient way of determining the queſtion: for whoever would thereafter inſure on an *Eaſt India* ſhip would know, hat he inſured the contingencies, and might take proper preautions againſt them, if he pleaſed. Whereas if every perſon ſhould be obliged to open to the inſurer all the grounds f his expectations about the ſhip's continuance in the *Eaſt Indies*, or coming to *England*, it might produce great litigaion and confuſion in caſes ariſing upon theſe policies.

Salvador v. Hopkins, 3 Burr. 1707.

The caſes, in which theſe principles as to *Eaſt India* voyages were firſt ſettled, were the nine cauſes tried upon the ſhip *Winchelſea*, an *Eaſt Indiaman*; in all of which the policies were the ſame, the parties only being different; and all of which were at firſt tried with various ſucceſs; but the nine verdicts were ultimately uniform for the plaintiffs, the inſured, againſt the underwriters.

The charter party was in the uſual printed form, and conained a clauſe, empowering the company's ſervants abroad o detain the ſhip a year longer, if they pleaſed, than the me originally limited by the charter party. The inſurance as in theſe words, "at and from *Bengal*, to any ports or places whatſoever in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere, beyond the *Cape of Good Hope*, forwards and backwards, and during her ſtay at each place, until her arrival at *London*, on money, *&c.*" On the twenty-fifth of *March* 762, the ſhip ſailed; on the nineteenth of *September*, in the me year, ſhe arrived at *Bombay*; and early in the *November* owing, ſhe left *Bombay* the firſt time. The ſhip arrived *Calcutta*, in *Bengal*, on the fifth of *March* 1763; and on twenty-eighth of the ſame month, the preſident and ncil of *Bengal* entered into a new agreement with the cap-, reciting, that the charter party would expire on the enth of *February* 1764, but that the preſident and council, ing it expedient to detain the ſhip in *India*, and being rous of having the time limited in the charter party proged, *&c.* the indenture therefore witneſſeth, that the cap-

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tain lets the ſhip to freight for one whole year from the ſaid eleventh of *February* 1764. The ſhip arrived at *Bombay* a ſecond time in *July* 1763: in *December* following, ſhe again ſailed for *Bengal*, and arrived there early in 1764; on the nineteenth of *March* in that year ſhe left *Bengal*, in order to proceed for *Bombay*, and on the twenty-firſt of that month, ſubſequent to the expiration of the old charter party, the ſhip was loſt. On the third of *April* 1764, Mr. *Hume*, the plaintiff in ſeveral of theſe actions, received a letter from the captain, dated the fourteenth of *April* 1763, incloſing a copy of the new agreement; which letter was publickly read in a coffeehouſe. The next day after the receipt of the letter, ſome inſurances were made by Mr. *Hume*. On the ſeventeenth of *July* 1764, other inſurances were effected by Mr. *Hume*, and all the other inſurances were made, after the captain's letter, of the fourteenth of *April* 1763, had been received and publickly read in a coffee-houſe.

3 Burr. 1713.

The court, after laying down all thoſe principles above ſtated, reſpecting the notorious uſage of this branch of trade, enlarged upon the circumſtances peculiarly diſtinguiſhing theſe cauſes. "No mention was made, or queſtion aſked, at "the time of underwriting, when the ſhip was chartered, "when ſhe ſailed from *England*; when ſhe arrived in *India*, "whether ſhe was detained a year according to the proviſo "in the charter party: and yet her continuance in the "*Indies* depended upon all theſe facts. If they ought to "ceſſarily to be diſcloſed, the policy was void, to the know- [49] "ledge of the underwriters, at the time they took the pre- "mium. The evidence in all the cauſes was very ſtrong "that her ſtaying a year longer, if known, would not have "varied the premium. This ſhip was inſured at the ſame "premium after the prolongation of her ſtay in *India* was "known. None of the defendants deſired to be off, as "they knew that an account of the new agreement had been "received in *England* upon the third of *April* 1764, which "was notorious to them all, before the intelligence of the "loſs, which came in the *October* following. So that

"there had been any force in the objection, it would have CHAP. II.
"been waved by the acquiescence of the underwriters, after
"they were fully apprized of the whole."

So also, in an action upon a policy "on the goods, specie, Gregory v. Christie, B. R. Trinity 24 Geo. III.
"and effects, of the plaintiff, on board the ship on her voyage
"from *London* to *Madras* and *China*, with liberty to touch,
"stay, and trade, at any ports or places whatsoever," a simi-
lar question arose upon the following facts. When the ship
arrived at *Madras*, she was too late to go to *China* that year;
upon which she was employed by the council there to go from
Madras to *Bengal* to fetch rice, which voyage she performed
ce, and, in attempting to perform it a second time, was
t. The jury found a verdict for the plaintiff.

A new trial was afterwards moved for on two grounds, Vide supra, c. 1. p. 11. where the other point is stated.
e of which only is material here, *viz.* that these interme-
ate voyages were not insured under the policy; for that the
ords "to touch, stay, and trade at any ports or places
whatsoever" only meant, to give a licence to stay at such
ces, as it should be necessary to stop at *in the course of the*
age.

Lord *Mansfield*.—"To understand this policy you must re-
to the course of trade, to which it relates. What is the
rse of trade with the *East India* Company? If an *India*
come to *Madras* too late in the season to proceed to
, the council employs her in an intermediate voyage. It
neficial to all parties so to employ her; the underwriters
erfectly well acquainted with this usage, and are bound
e notice of it. Before the year 1780, it was usual to
e both the outward and homeward-bound voyage in one
y, and then the words "*backwards and forwards*" were
ted: but since that time, they have separated the insu-
, and insure the outward voyage in a distinct policy.
policy in question differs from others; because it contains
mission to *trade*, as well as to *touch and stay*, at any ports
laces, which is not usual in policies of this nature: for
neral they only permit them to *touch and stay*, which [50]

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words can only be intended to give a permiſſion ſo to do, if neceſſity oblige them; but to *touch*, *ſtay*, *and trade*, are words ſo large, that they ſeem to include the intermediate voyage. It would narrow the conſtruction very much, indeed, to ſay, that the policy relates to thoſe places *only*, at which they ſhall ſtop *in* the voyage. The words made uſe of certainly take in the intermediate voyage; and the uſage of trade confirms this conſtruction." The conſequence of this opinion was, that the verdict of the jury was held to be right.

Farquharſon v. Hunter, E. R. Hilary 25 Geo. III.

So alſo, in an action on a policy of inſurance upon the ſhip *Blandford*, "at and from *London* to *Madras* and *Bengal*, "beginning the riſk upon the ſaid ſhip, &c. at *London*, and "ſo to continue till the arrival of the ſaid ſhip at *Madras* "and *Bengal*, with liberty to touch and ſtay at any port or "place in this voyage:" the facts were theſe. The *Blandford* arrived at *Madras*, where her cargo was unloaded, by order of the preſidency; ſhe was then ſent for rice to *Viſagipatnam*, and by an entry in the council book, her voyage to *Bengal* is ſaid to be poſtponed. That part of her outward-bound cargo, which was intended for *Bengal*, was ſent thither in the *Lord Mulgrave*, and afterwards the *Blandford* was ſent to *Bengal* in ballaſt, and was taken in the paſſage; for which loſs this action was brought. At the trial, Lord *Mansfield* thought the words in the policy would not admit of ſuch a latitude of conſtruction, as to take in the intermediate voyage, the words being much narrower than thoſe in *Gregory* v. *Chriſtie*: upon which the plaintiff was nonſuited.

However, in the following term, when a motion was made to ſet aſide the nonſuit, his lordſhip ſaid, "This is a "policy on the ſhip: it is an *India* voyage: and the uſage "as to the intermediate voyages is notorious to both parties; [51] "and the contract refers to it. The inſurance here is from "*London* to *Madras* and *Bengal*. What is the uſage of the "trade? That when the ſhips arrive at *Madras*, the council "may ſend them elſewhere."—The other judges concurred; and the rule for ſetting aſide the nonſuit was made abſolute.

From theſe caſes it is evident, that in the conſtruction of *Eaſt India* policies, whether the words be large and comprehenſive, as in *Salvador* v. *Hopkins*, and *Gregory* v. *Chriſtie*; or reſtrained and limited as in the laſt caſe, the uſage of trade ſhall always be conſidered, and the intermediate or country voyages held to be inſured. At the ſame time, though the general rule be ſo, the parties contracting may, by their own agreement, prevent ſuch a latitude of conſtruction; and ſo Lord *Mansfield* ſaid in *Salvador* v. *Hopkins*. In order to do this, it is not neceſſary that expreſs words of excluſion ſhould be inſerted in the policy; but if, from the terms uſed, the court can collect that ſuch was the intention of the parties, that conſtruction, which is moſt agreeable to their intention, ſhall moſt aſſuredly prevail.

Thus, in an action upon a policy, the voyage inſured was deſcribed in theſe words: "at and from *Port L'Orient* to "*Pondicherry*, *Madras*, and *China*, and at and from thence "back to the ſhip's port or ports of diſcharge in *France*, with "liberty to touch, *in the outward or homeward bound voyage*, "at the iſles of *France* and *Bourbon*, and at all or any other "place or places what or whereſoever." In a ſubſequent part of the policy, there was this clauſe, "and it ſhall be "lawful for the ſaid ſhip *in this voyage*, to proceed and ſail "to, and touch and ſtay at any ports or places whatſoever, "as well on this ſide, as on the other ſide of the *Cape of* "*Good Hope*, without being deemed a deviation." The ſhip arrived at *Pondicherry*, and after remaining there one month, ſhe ſailed for *Bengal*, inſtead of going to *China*; having wintered at *Bengal*, and received conſiderable repairs, ſhe returned to *Pondicherry*; and having taken in a homeward-bound cargo, proceeded in her voyage back to *L'Orient*, but was taken by the *Mentor* privateer. The queſtion in that caſe, as far as it is material to us in this part of our work, was whether the voyage to *Bengal* was inſured within the conſtruction of this policy. The reporter of this caſe ſays, it was inſiſted, in the opening for the plaintiffs, that, under the general liberty given by the policy, of touching at all places whatſoever, the veſſel might go to *Bengal*, which, by

Lavabre v. Wilſon and Lavabre v. Walter, Douglas 284.

Mr. Douglas.

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the operation of thoſe words, was as much part of the voy- age, as if it had been expreſsly named.—Lord *Manſfield*, however, having intimated a clear opinion, that the general words were, by the expreſſions of "*in the outward or home-* "*ward-bound voyage*," and "*in this voyage*," qualified and reſtrained ſo as to mean all places whatſoever in the uſual courſe of the voyage "*to and from the places mentioned in the* "*policy*," this ground was immediately abandoned, and never farther mentioned by the counſel for the plaintiffs in the progreſs of theſe cauſes.

But although the judges have been thus liberal in their conſtructions of this contract, and have gone as far as poſſible to effectuate the intention of the parties; yet they have never extended thoſe equitable principles to ſuch a length as to ſay that when a man has inſured one ſpecies of property, he ſhall recover damage, which he has ſuffered by the loſs of a de- ſcription of property, different from that named in the policy. Thus a man, who has inſured a cargo of goods, cannot re- cover under ſuch a policy, the freight, which he has paid for the carriage of that cargo; nor ſhall it be permitted to the owner of a ſhip, who inſures the *ſhip merely*, to demand ſa- tisfaction for the loſs of merchandize laden thereon, or to ask from the inſurers *extraordinary wages paid to the ſeamen*, *the value of proviſions conſumed*, by reaſon of the detention of the *ſhip* at any port, longer than was expected.

See poſt, 53.

Such attempts have, indeed, been made, but they have al- ways been reſiſted: for to admit of ſuch demands would in- troduce an infinite variety of frauds, and would be re- pugnant to the moſt ſettled maxims of inſurance law, and the conſtant practice and uſage of trade. In *Molloy* it is ſaid, that if a merchant inſure a ſhip generally, and the ſame then happen to be laden, and if it afterwards miſcarry, the inſurer ſhall not anſwer for the goods, but only for the ſhip. This poſition ſtands uncontradicted by any foreign writer, an- cient or modern, and is ſupported by ſeveral deciſions of the firſt authority in this country.

Molloy b. 2. c. 7. ſ. 8.

Roccus de Aſſecur. Not. 16.

In an inſurance *upon the ſhip Tartar* at and from *London* to *Newcaſtle*, and *Marſeilles*, and at and from *Marſeilles* to her diſcharging port or ports in the *Weſt Indies* (*Jamaica* excepted), the facts were, that the ſhip being diſtreſſed bore away for *Minorca*, and put into *Port Mahon*, where the captain obtained leave from the vice admiralty court to have his ſhip ſurveyed, in conſequence of which, ſhe was long detained; and the action was brought to recover the extraordinary wages, and the proviſions expended during the detention for theſe repairs.

Fletcher and others v. Poole, Sitt after Eaſt. 1769, before Lord Mansfield at Guildhall.

Lord *Mansfield* was of opinion, that ſuch articles as ſailors wages and proviſions expended, while a ſhip is detained to refit, can never be allowed as a charge againſt the inſurer *on the ſhip*; and a verdict was accordingly given for the defendant.

In another cauſe, after a trial at *Guildhall*, a ſpecial caſe was reſerved for the opinion of the court, ſtating, that this was an action upon a policy of inſurance *on goods* at and from *Nevis* to *Briſtol*. The ſhip ſailed from *Nevis*; but, before her arrival at *Briſtol*, ſhe was captured and taken into *Morlaix*, and there condemned. An appeal was lodged in the parliament of *Paris*, where the ſentence was reverſed, and the ſhip and cargo were decreed to be reſtored. Before the ſentence of reſtitution, the ſhip and cargo had been ſold; but the money was paid, the charges of proſecuting the appeal being deducted. The defendants have paid all the charges of the ſuit, and the ſalvage, except the ſum now in demand, which was paid by the plaintiffs, as owners of the goods to the owner of the ſhip for *freight pro ratâ itineris*; and for which *freight* this action is brought on the policy *on goods*.

Baillie v. Mouſdigliani, B. R. Hil. 25 Geo. III.

After time taken to deliberate, Lord *Mansfield* delivered the unanimous opinion of the court for the defendants; the *item* now in litigation, his lordſhip ſaid, is that which was paid for freight, by the owner of the cargo to the proprietor of the ſhip *pro ratâ itineris*. The queſtion is, whether he

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can charge theſe underwriters for it. As between the owners of the ſhip and cargo, in caſe of a total loſs, no freight is due: but as between them no loſs is total, where part of

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the property is ſaved, and the owner takes it to his own uſe. In this caſe, the value of the goods was reſtored in money, which is the ſame as the goods; and therefore freight was certainly due *pro ratâ itineris*. But as between the owners of the goods, and the underwriters *upon the cargo*, the latter have nothing to do with the *freight*. The owner of the ſhip has a lien for his freight; but in a total loſs, literally ſo called, no freight is due. In caſe of a loſs, total in its nature, with ſalvage, the owner of the goods may either take the part ſaved, or abandon: but in neither caſe, can he throw the freight upon the underwriters; becauſe they have not engaged to indemnify him againſt it.

Eden v. Poole, Sitt. after Hil. 1785.

This alſo was an action on a policy of inſurance, which was on the *ſhip and goods* from *Oſtend* to *Dominique*. The following facts appeared in evidence: that the ſhip met with bad weather, and was in great diſtreſs: that the crew threatened to take the command from the captain, unleſs he would make for the firſt port: that he then went to *Ferrol* to repair his ſhip, and by the time the repairs were finiſhed, the crew forſook her: that he then got another crew, and at the moment he was going to ſail, the *Spaniſh* governor ſtopped him; that after a detention of 37 days, ſhe was diſcharged, and then arrived at *Dominique*. This action was brought for the expence incurred by wages, proviſions, &c. during the demurrage at *Ferrol*. On the part of the inſurer it was contended, and ſo held by Mr. Juſtice *Buller*, who preſided upon that trial, that the freight, and not the ſhip, is liable for this loſs, and that the charge of demurrage could not be allowed upon this policy. The plaintiff was nonſuited.

Robertſon v. Ewer, 1 Term Reports, p. 127.

Agreeable to the above doctrine, there is a modern deciſion of the whole court of King's Bench. It was an action on a policy of inſurance, on the ſhip *Dumfries*, at and from *London* to *Africa* during her ſtay and trade there, and at and from thence to her port or ports of diſcharge in the *Britiſh Weſt India*

India iſlands, to recover a partial loſs. The facts were, that this ſhip, in the courſe of the laſt war, after performing her voyage to *Africa*, in coming from thence laden with ſlaves to the *Weſt Indies*, touched at *Barbadoes* in *December* 1781, for the purpoſe of watering, at which iſland an embargo was laid on all ſhips, by order of Lord *Hood*, the commander in chief upon that ſtation; and the veſſel was detained a conſiderable time. The captain applied for leave to depart; but [55] was refuſed: whereupon he attempted to ſail away privately in the night, but was purſued by the *Salamander* ſloop of war, and after a ſlight engagement, he was brought back, the *Dumfries* not having ſuſtained any damage, for which the underwriters could be charged, on account of a clauſe, exempting them from partial loſſes, not amounting to 3 *per cent.* Lord *Hood*, in conſequence of this breach of embargo, upon her return took almoſt all the men out of the *Dumfries*, diſperſed ſome of the crew among the ſhips of war, the captain and the reſt of the crew were confined; and the ſhip was detained at *Barbadoes* till the *April* following. This detention, however, was not proved to have ariſen ſolely from the embargo, as it appeared, that, for ſome part of the time, the ſmall-pox prevailed among the ſlaves, and that the embargo was frequently taken off and renewed between *December* and *April*. The action was brought to recover from the inſurer upon *the ſhip* the additional *wages* paid to the ſeamen, and the *charges for proviſions*, during this detention.

Mr. Juſtice *Buller* was of opinion, at the trial, that the only damages proved, being items for ſeamens wages, proviſions, and demurrage, during the detention, could not be recovered under this policy on the ſhip only. To make the underwriter liable, there muſt be a loſs of the ſhip, for the policy is on the body of the ſhip only; and if ſhe arrive ſafe at her port of delivery, be the voyage ever ſo long, you cannot recover under ſuch a policy; if, indeed, ſhe be in ſuch a ſtate as to prevent her from completing her voyage, it is certainly a loſs. The plaintiff was nonſuited.

In the following term a motion was made to ſet aſide the nonſuit, which, after argument, was refuſed by the whole court

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court to be done, and upon that occaſion Lord *Mansfield* ſaid, "There is no authority to ſhew, that on this policy, the inſured can recover for ſuch a loſs; but it is contrary to the conſtant practice. On a policy on a *ſhip*, ſailors wages or proviſions are never allowed in ſettling the damages. The inſurance is on the *body of the ſhip*, tackle, and furniture; [56] *not on the voyage or crew.* In this caſe it is admitted, that there was no damage done to the ſhip, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."

Mr. Juſtice *Buller*.—"I take it to be perfectly well ſettled, that you are not to recover on a policy on the body of the ſhip for ſeamens wages or proviſions: theſe are not the ſubject of the inſurance. The caſe put at the bar proves the rule. For if the ſhip had been detained in conſequence of any injury which ſhe had received in a ſtorm, though the underwriter muſt have made good that damage, yet you could not have come upon him for the amount of wages or proviſions, during the time ſhe was ſo repairing. Here the ſhip itſelf is ſafe; and the court only look to the thing itſelf, which is the ſubject of inſurance; and the wages and proviſions are no part of the thing inſured."

The doctrine contained in the preceding caſes was much diſcuſſed, and by ſome ſuppoſed to be conſiderably ſhaken by a deciſion of the court of King's Bench in the year 1791; where it was unanimouſly held by the learned judges, that *proviſions* ſent out in a ſhip for the uſe of the crew are protected by a policy of inſurance on the *ſhip and furniture*. In the argument of that caſe, the judges at firſt thought it fell within the principle of deciſion in *Robertſon* v. *Ewer*, which they were determined to ſupport: but the grounds of diſtinction between the two deciſions are ſtated with ſo much clearneſs and perſpicuity, and the effect of uſage upon this ſpecies of contract ſo well aſcertained, that I feel it my duty not to abridge the arguments adopted by the court.

Brough v. Whitmore, 4 Term Rep. 206.

It was an action on a policy of inſurance on an *Eaſt India* and *China* ſhip, and on the tackle, ordnance, ammunition, artillery,

artillery, and *furniture of the ſhip*. At the trial before Lord *Kenyon* at *Guildhall*, it appeared that while the ſhip was lying off *Bank-ſaul Iſland* in the river *Canton*, it became neceſſary to refit her, for which purpoſe the *ſtores and proviſions* were taken out of her, and put into a warehouſe, called a bank-ſaul, and that while they were in the warehouſe, they were deſtroyed by an accidental fire. It was admitted that the policy covered all the articles but the proviſions, which were merely for the uſe of the ſhip's crew: but if thoſe proviſions were not protected by the policy, then there was not an average loſs of 3*l. per cent.* It was conſidered in the ſame light, as if the accident had happened on board the ſhip. For the defendant it was contended, that the proviſions were not protected by the inſurance; but one of the jury ſaid, it had been determined in Lord *Mansfield*'s time, that they were included under the word *furniture*, under which deciſion the merchants had ſince acquieſced: on which the plaintiffs obtained a verdict.

See ante, p. 41.

A motion, founded upon this objection, was afterwards made to ſet aſide the verdict, and an enquiry was ordered reſpecting the caſe alluded to by the juryman; and the argument was fully entered into at the bar.

Lord *Kenyon*, after obſerving on the looſe and ambiguous terms of policies of inſurance, ſaid, "The queſtion here ariſes on the meaning of the word "*furniture*;" one of the jurymen ſaid, and in that he is now confirmed, that according to the underſtandings of thoſe who enter into theſe contracts, it includes *the proviſions for the uſe of the crew*. Now, among the ſeveral accidents, againſt which the defendant inſured, *are perils by fire*; and this ſhip being at *Canton*, it became neceſſary to refit her, and to take out all her goods and land them on this iſland, where the accident happened; by which theſe proviſions, with the reſt of the goods, were burned; and there is no doubt but that the loſs on this iſland muſt be conſidered in the ſame light as if it had happened on board the ſhip itſelf. This was determined in *Pelly* v. *The Royal Exchange Aſſurance Company*. Then if theſe proviſions be inſured

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as part of the out-fit of the ſhip, and they were conſumed by one of the perils inſured againſt, there is an end of the queſtion; a loſs has happened within the meaning of the policy; and conſequently the defendant is liable. But it was ſaid in the argument that the inſtant any of the proviſions were conſumed on board, there could not be a total loſs: but the ſhort anſwer to that is, that that comes within the wear and tear of the ſhip, and it might as well be ſaid that if a maſt were a little injured there could not be a total loſs. If this deciſion were to militate againſt any determination, or even an *obiter dictum*, of Lord *Mansfield*, I ſhould have heſitated for ſome time before I delivered my opinion. But the caſe of *Robertſon* v. *Ewer* is clearly diſtinguiſhable from the preſent; here the goods were conſumed by an accident by fire on board the ſhip, (for the iſland was for this purpoſe equivalent to the ſhip), and within the meaning of the policy of inſurance: but in that caſe they were conſumed *by the Negroes during a detention* of the ſhip."

Mr. Juſtice *Aſhhurſt*.—"The caſe cited is not like the preſent, for the reaſon given; and I think that this loſs comes within the terms of the policy. It is an undertaking to inſure againſt all accidents which will prevent the proviſions being applied to the purpoſe for which they were intended. Theſe proviſions were part of the out-fit; they were conſumed by fire, (one of the accidents againſt which the defendant inſured), and conſequently could not be applied to the purpoſe for which they were put on board."

Mr. Juſtice *Buller*.—"I am clearly of opinion that the underwriters on the body and furniture of the ſhip are liable to pay the amount of theſe proviſions, which were bought to replace thoſe, which were conſumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is ſufficient to ſay that a policy of aſſurance has at all times been conſidered in courts of law as an abſurd and incoherent inſtrument; but it is founded on uſage, and muſt be governed and conſtrued by uſage. Now it is perfectly clear that in every inſtance, where loſſes have been ſettled,

ſettled, the proviſions put on board the veſſel when ſhe ſailed, have been conſidered as part of the ſhip. The value is taken in this way; the underwriters have a right to go and ſee the ſhip, to examine the value of the hull, the maſts, and the proviſions; the value of the ſhip alone comprehends all theſe articles: but though the underwriters have a right to examine the ſhip itſelf, in point of fact they do not, becauſe they know from experience, the quantity of proviſions neceſſary for the crew for the intended voyage; and if that value be ſtated to them in the ordinary way, they ſign their names immediately without making further enquiries. Then if the proviſions be included in a policy on the ſhip, and the ſhip and all the proviſions be loſt, the underwriters muſt make good the whole loſs, whether it be a valued or an open policy. But it has been ſaid that, if an accident happen after ſome of the proviſions are conſumed, the underwriters are entitled to a deduction to the amount of ſuch proviſions: I will anſwer this, firſt, as the argument applies to a valued, and then to an open policy. As to the firſt; from the nature of the policy, the proviſions are not inſured againſt all events; they are only inſured againſt particular riſks. Again, there is nothing from which there can be ſalvage; if the body of the ſhip and every thing on board be ſunk, or burned, there can be no ſalvage. And, in the caſe of an open policy, the inſured muſt prove by evidence what was the value of the whole, and then the ſame reaſons apply as in the caſe of a valued policy. With reſpect to the caſe of *Robertſon* v. *Ewer*, which has been relied on; I thought at firſt that it applied ſtrongly to the preſent; and if I ſtill entertained the ſame opinion, I would not, on account of any uſage to the contrary among underwriters, overturn a ſolemn determination of this court: but that caſe, and the two others there mentioned, are clearly diſtinguiſhable from the preſent. In all thoſe the inſured wiſhed to charge the underwriters with the amount of the proviſions conſumed, during the time when the ſhips were detained. Of thoſe therefore it is ſufficient to ſay that an inſurance is *on the ſhip for the voyage*: but, during a detention, the ſhip is not proceeding; and therefore the underwriters are not liable. This caſe alſo differs from that of *Robertſon*,

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Robertſon v. *Ewer*, in another circumſtance; there the proviſions were conſumed by the ſlaves on board, and not by the ſhip's crew, and the ſlaves are conſidered as part of the cargo. The words of Lord *Mansfield* in that caſe muſt be taken with a reference to the caſe then before him: He was then ſpeaking of a charge for proviſions uſed during the detention of the ſhip, and for the maintenance of the ſlaves; and he ſaid, "there is no authority to ſhew that, on *this* policy, the in-"ſured can recover for *ſuch a loſs*; but it is contrary to the "conſtant practice." Then he proceeded to ſay, on a policy on a ſhip, ſailors' wages or proviſions are never allowed in ſettling the damages. Now, even if thoſe latter words be taken in their general ſenſe, and not confined to the caſe immediately before the court, they are accurate; for "proviſions" *eo nomine* are not taken into conſideration. In general, the captain of a ſhip takes on board proviſions ſufficient for the voyage; and if he be detained in any port, and he be a prudent man, he will not uſe what are called the ſhip's ſtores during his detention, but he will buy others for immediate conſumption during the detention, becauſe he cannot but know that he has the ſame length of voyage to perform that he had before he was detained: it makes no difference however to the underwriters whether he do ſo or not; for if the captain be obliged to purchaſe other ſtores for the remainder of the voyage, the underwriters are not anſwerable for theſe, but only for thoſe which were on board at the time of the inſurance, ſince they only formed a part of the value of the ſhip. On the whole therefore I am of opinion that there ſhould be no new trial. The caſes cited are diſtinguiſhable from the preſent; the uſage of merchants, as to the conſtruction of theſe inſtruments, ſtands unimpeached, and therefore it muſt prevail in this caſe."

Mr. Juſtice *Groſe* agreed, and the rule was diſcharged.

Hoſkins v. Pickerſgill, B. R. Eaſter, 23 Geo. III.

In an inſurance upon a *Greenland* ſhip, it became a queſtion, whether the *lines and tackle* employed in the fiſhery in thoſe ſeas could be recovered under a policy made upon *the ſhip, tackle and furniture*, &c. This caſe came before the court,

court, upon a motion for a new trial, and the judges were unanimouſly of opinion, that they were not protected by the policy, not being part of the *ſhip*'s tackle or furniture. CHAP. II.

It is alſo neceſſary, in order to entitle the inſured to recover, that the loſs, which has happened, be a direct and immediate conſequence of the peril inſured, and not a remote one. This doctrine was laid down in a caſe before Lord *Mansfield*, and the deciſion of the jury was agreeable to the principle ſtated by the Chief Juſtice.

It was an action on a policy of inſurance "at and from "*Briſtol* to the coaſt of *Africa*, during her ſtay and trade "there, and from thence to her port or ports of diſcharge in "the *Weſt Indies*." There was a memorandum on the po- "licy, that the aſſurers are not to pay any loſs that may "happen in boats during the voyage (mortality by natural "death excepted) and not to pay for mortality by mutiny, "unleſs the ſame amount to 10*l. per cent.* to be computed "on the firſt coſt of the ſhip, outfit, and cargo, valuing "negroes ſo loſt at 35 *l.* per head." The demand upon the policy was the loſs of a great many ſlaves by mutiny. The evidence of the captain was, that he had ſhipped 225 prime ſlaves on board: that on the third of *May*, before he failed from the coaſt of *Africa*, an inſurrection was attempted; that the women ſeized him on the quarter deck, and endeavoured to throw him overboard, but he was reſcued by the crew; that the women and ſome men threw themſelves down the hatchway, and were much bruiſed. That he ſent the ring-leader on ſhore, and twelve men and a woman afterwards died of thoſe bruiſes, and from abſtinence: that on the 22d of *May* there was a general inſurrection, the crew were forced to fire upon the ſlaves, and attack them with weapons, it being a caſe of imminent neceſſity. Several ſlaves took to the ſhip's ſides, and hung down in the water by the chains and ropes, ſome for about a quarter of an hour, three were killed by firing, and three were drowned, the reſt were taken in, but they were too far gone to be recovered; many of them were deſperately bruiſed, many died in conſequence of the wounds they

Jones v. Schmoll, Guildh. Tr. Vac. 1785, 1 Term Rep. p. 130. Note (a).

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they had received from the firing during the mutiny, ſome from ſwallowing ſalt water, ſome from chagrin at their diſappointment, and from abſtinence; ſeveral of fluxes and fevers; in all to the amount of 55. The underwriter had paid at the rate of 15 *per cent.* for 19, who were either killed during the mutiny, or had afterwards died of their wounds. Another conſequential damage was ſtated, that the mutiny had leſſened the remaining ſlaves in the eſtimation of the planters, and reduced their price.

Lord *Mansfield* ſaid, "as to the latter loſs, I think the underwriter is not anſwerable for the loſs of the market, or the price of it: that is a remote conſequence, and not within any peril inſured againſt by the policy.

"The queſtion for the jury will be, whether any of thoſe who died by any other means, except by being fired upon, or in conſequence of the wounds and bruiſes which they received during the ſtruggle, are within the meaning of the policy, which inſures againſt damage by mutiny. This policy is in the common form, and if it were not for the memorandum, I ſhould ſay, the caſe was not within the inſtrument. But as it now ſtands it is very clear, that thoſe who were killed by the firing, or died in conſequence of their wounds, are within the policy; the other complicated caſes muſt be left to the jury. The firſt claſs, ſuch as were killed in the fray, certainly come within the meaning of the policy; and the ſecond claſs alſo, thoſe who died of the wounds they received. The third claſs are, I think, as clearly not within it, ſuch as being baffled in their attempts, in deſpair choſe a mode of death, by faſting, or died through deſpondency: that is not
[58] mortality by mutiny, but the reverſe, for it is by *failure of mutiny*. The great claſs are ſuch as received ſome hurt by the mutiny, but not mortal, and died afterwards of other cauſes, as thoſe who ſwallowed water, jumped overboard, *&c.* This is the great point."

The jury found, that all who were killed in the mutiny, or died of their wounds, were to be paid for. That all thoſe who

who died of their bruiſes, which they received in the mutiny, though accompanied with other cauſes were to be paid for. That all who had ſwallowed ſalt water, and died in conſequence thereof, or who leaped into the ſea, and hung upon the ſides of the ſhip, without being otherwiſe bruiſed, or who died of chagrin, were not to be paid for.

In the conſtruction of policies of inſurance for time (*a*), which are very frequent, the ſame liberality, equity, and good ſenſe, have always prevailed, as in all other inſurances: and the courts have gone, as far as poſſible, to decide according to the intention of the parties.

In an action on a policy of inſurance on the ſhip *Mary*, a letter of marque, the words of the policy were, "at and "from *Liverpool* to *Antigua*, *with liberty to cruiſe ſix weeks*, "and to return to *Ireland*, or *Falmouth*, or *Milford*, with any "prize or prizes." This ſhip having been taken, this action was brought, and came on to be tried before Baron *Hotham* at *Lancaſter*, when a verdict was found for the plaintiffs. Syers and others v. Bridge, Doug. 509.

Upon a motion for a new trial, the material parts of the evidence were, that the policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or the duration of the voyage. The captain of the ſhip, being called on the part of the plaintiffs, ſwore that he in fact ſailed from *Liverpool* on the 28th of *February*: he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of *March*, chaſing, however, at different times, from the 7th to the 14th, at which time he began his cruiſe, giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. From the 14th of *March*, he continued cruiſing about the ſame latitude till the 17th or 18th of *April*; when he diſcontinued the cruiſe, of which he alſo gave notice, intending to go to the *Burlings*, off *Liſbon*, in the courſe [59]

(*a*) By a late act of parliament 35 Geo. III. c. 63. ſ. 12. no policy upon any ſhip, or intereſt therein, ſhall be made for any longer term than 12 calendar months. See ante, p. 28.

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of his voyage. On the 23d he renewed the cruiſe, of which he gave notice as before, and ordered a minute, to that purpoſe, to be entered in the log-book. From that time he continued cruiſing till the 28th of *April*, when he was taken by an *American* privateer. Many witneſſes were examined, ſome of whom thought, that the liberty of cruiſing given by the policy, meant ſix ſucceſſive weeks; others conceived, that if the ſeparate times of cruiſing, when added together, ſhould not exceed the ſpace of ſix weeks, the terms of the inſurance would be complied with: but none of them could prove any uſage, as none of the witneſſes ever knew a caſe exactly circumſtanced like the preſent.

Lord *Mansfield*.—"This was merely a queſtion of conſtruction, on the face of the policy, and unleſs an uſage could have been ſhewn in favour of this deſultory cruiſing, calling witneſſes to ſupport it, was calling them to ſwear to mere opinion. None of thoſe produced knew of any inſtance; and therefore, their evidence ought not to have been received. Yet, I dare ſay, their teſtimony had great weight with the jury. The meaning of words depends upon the ſubject. The inſtructions were not read, but they ſhew the meaning very clearly, for they run thus: "To cruiſe ſix "weeks, and *then* proceed to *Antigua*." There can be no general rule. Here the ſubject matter, in my opinion, is deciſive to ſhew, that the ſix weeks meant one continued period of time. A cruiſe is a well known expreſſion for a connected portion of time. There are frequently articles for a month's cruiſe, a ſix weeks cruiſe, *&c.* Such a liberty, as in this caſe, to a letter of marque, is an excuſe for a deviation. But what is contended for by the plaintiffs is impoſpoſſible in practice. Suppoſe the ſhip returns *directly back*, cruiſing for the ſpace of a week. She may then perhaps take three weeks to return to where ſhe had been. Can ſhe then renew the cruiſe, return again, and ſo repeatedly? The voyage, in that way, might laſt for years. But the true meaning is, "I will excuſe a deviation for ſix weeks." The inſtructions, although it happens they were not read, ſtrike me much. Another argument: Six weeks is a continuation, a con-

a congregate denomination of time. If they had meant separate days, they would have ſaid forty-two days." The rule for a new trial was made abſolute. CHAP. II.

Having ſaid thus much of conſtruction in general, by which it appears, that the material rules to be adhered to, are the intention of the parties entering into the contract, and the uſage of trade; it will be proper to conſider more particularly, what ſhall be conſtrued a loſs within the meaning of the policy. This mode of treating the ſubject naturally leads us to conſider loſſes by perils of the ſea; loſſes by capture, and by detention of princes or people; and loſſes by the barratry of the maſters or mariners; which are the great diviſions of perils inſured, and which will furniſh materials for the three following chapters.

CHAPTER THE THIRD.

Of Loſſes by Perils of the Sea.

CHAP. III.

THE ſubject matter of this chapter may be reduced to a very ſmall compaſs; as very few queſtions have ever been agitated in the *Engliſh* courts of law upon this point. It may, in general, be ſaid, that every thing which happens to a ſhip, in the courſe of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the ſea. Thus in an inſurance againſt perils of the ſea, every accident happening by the violence of wind or waves, by thunder and lightning, by driving againſt rocks, by the ſtranding of the ſhip, or by any other violence which human prudence could not foreſee, nor human ſtrength reſiſt, may be conſidered as a loſs within the meaning of ſuch a policy; and the inſurer muſt anſwer for all damages ſuſtained, in conſequence of ſuch accident. But if a ſhip be driven by ſtreſs of weather on an enemy's coaſt, and is there captured, it is a loſs by capture, and not by perils of the ſea. This was ruled by Lord *Kenyon* in an action on a policy againſt capture only, and the ſhip was driven by a hard gale of wind on the coaſt of *France*, and was there captured, but ſhe did not receive any damage by the wind. Lord *Kenyon* ſaid, this was clearly a loſs by capture, for had ſhe been driven on any other coaſt than that of an enemy, ſhe would have been in perfect ſafety. The plaintiff had a verdict.

1 Shower 323. Roccus. Not. 64.

Green v. Elmſlie, Peake 212.

In caſes where the loſs is not total, but only partial, ariſing from a leak, from the ſtranding of the ſhip, or from the loſs of her maſts, cables, or rigging, the inſurers upon the cargo are liable to reſtore the value of all the damaged goods, and the underwriter upon the ſhip is alſo anſwerable for all the injury which ſhe has ſuſtained.

1 Magens 52. 76.

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In charter parties, if the veſſel freighted was robbed or taken by pirates, that was held to be a loſs within the meaning of the words "perils of the ſea." It is alſo ſaid, that the ſame rule of conſtruction prevails as to policies of aſſurance. That poſſibly might, and would be the true conſtruction upon thoſe words: but as it is now the univerſal cuſtom to inſure againſt the attacks of pirates, by expreſs words inſerted in the policy, that queſtion can now hardly ariſe.

2 Roll. Abr. 248. pl. 10. Comberbatch, 56.

Although the courts in this caſe, as in all others, will endeavour to give effect to this ſpecies of contract, by a liberal and equitable conſtruction; yet they will be cautious not to extend the principle ſo far, as to ſay, that the acts of the parties ſhall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and ſee that the loſs, which is proved to have happened, is really one of thoſe riſks againſt which the underwriter has inſured.

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An action was brought upon a policy of inſurance for the value of certain ſlaves, inſured by that policy. The declaration ſtated, "that by perils of the ſea, contrary winds, cur-"rents, and other misfortunes, the voyage was ſo much re-"tarded, that a ſufficient quantity of water did not remain "for the ſupport of the ſlaves, and other people on board, "and that certain of the ſlaves, mentioned in the declara-"tion, periſhed for want of water." The facts, appearing in evidence, were, that the ſhip, being bound from *Guinea* to *Jamaica*, had miſſed the iſland, and the crew were reduced to great diſtreſs for want of water: that the captain conſulted with the crew, and it was unanimouſly agreed upon that ſome of the ſlaves ſhould be thrown overboard, in order to preſerve the reſt: that at the time this reſolution was formed, there remained but one day's full allowance of water, at two quarts *per* man. The jury, upon this evidence, found a verdict for the plaintiff, with damages at 30 *l.* a head for every ſlave thrown overboard.

Gregſon v. Gilbert, B. R. Eaſter, 23 Geo. III.

CHAP. III.

A motion was afterwards made for a new trial, upon the ground, that this was not a loſs by perils of the ſea.

Lord *Mansfield*.—" This is a very uncommon caſe, and deſerves a further conſideration. There is great weight in the objection, that the loſs is ſtated, by the declaration, to have ariſen from the perils of the ſea, and that the currents, *&c.* had made the ſhip foul and leaky. Now does it appear by evidence, that the ſhip was foul and leaky? On the contrary, the loſs happened by miſtaking *Jamaica* for another place. Beſides, a fact has been mentioned by the counſel of throwing ſome overboard after the rain fell, a fact, which is not agreed on by both ſides, though a very material one."

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Mr. Juſtice *Buller*.—" The declaration does not, in any part of it, ſtate the loſs, which has been the occaſion of this demand; and it would be very miſchievous, if we were to overturn this objection. Suppoſe, for a moment, that the underwriters, in ſome caſes, are liable for the miſtake of the captain, yet, if they are not liable in others, the nature of the loſs muſt be ſtated in the declaration, that the defendant may have an opportunity of moving in arreſt of judgment, if it be not ſufficiently alledged. But it would be impoſſible for the defendant in this caſe to move in arreſt of judgment: for the facts of the caſe, as proved, are different from thoſe ſtated in the declaration. The point of law in arreſt of judgment can only be argued from the facts ſtated on record; and the declaration in this caſe ſtates the loſs of the plaintiff to have happened by perils of the ſea." The rule for a new trial was made abſolute, on payment of coſts.

Tatham v. Hodgſon, 6 Term R. 656.

So in a more modern caſe, in an inſurance upon ſlaves againſt *perils of the ſea*, their death by failure of ſufficient and ſuitable proviſion, though that failure was occaſioned by extraordinary delay in the voyage from bad and ſtormy weather, was holden not to be a loſs within the policy by perils of the ſea, but a loſs by natural death, which cannot now be inſured againſt ſince the ſtatutes for regulating the manner of

carrying ſlaves in *Britiſh* veſſels from the coaſt of *Africa*, by *which it is provided, that no loſs or damage ſhall be recoverable on a policy on account of the mortality of ſlaves by natural death or ill treatment, or againſt loſs by throwing overboard of ſlaves on any account whatſoever*, &c. CHAP. III. 30 Geo. III. c. 23. 34 Geo. III. c. 80. 39 Geo. III. c. 80. ſ. 24.

In an action on a policy of inſurance at and from *Saint Bartholomew* to the coaſt of *Africa*, and during her ſtay and trade there and back to *Saint Bartholomew*, it was attempted, under a count for a loſs by *perils of the ſea*, to recover for a total loſs of the ſhip, which appeared to have been deſtroyed by a ſpecies of worms, which infeſt the rivers of *Africa*. An intelligent merchant ſwore, that he had known *many inſtances* of this ſpecies of loſs, but that the underwriters had invariably refuſed to pay. Lord *Kenyon*, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loſs by perils of the ſea. Rohl v. Parr, Guildhall, Sitt. after Hill. 1796.

If a ſhip has been miſſing, and no intelligence received of her within a reaſonable time after ſhe ſailed, it ſhall be preſumed that ſhe has foundered at ſea.

The ſhip *Charming Peggy* was inſured in 1739, from *North Carolina* to *London*, with a warranty againſt captures and ſeizures, and in an action the loſs was laid in the declaration to be by ſinking at ſea. All the evidence given was, that ſhe ſailed out of port on her intended voyage, and had never ſince been heard of. Several witneſſes proved, that, in ſuch a caſe, the preſumption is, that ſhe periſhed at ſea, all other ſorts of loſſes being generally heard of. It was inſiſted for the defendant, that as captures and ſeizures were excepted, it lay upon the plaintiff to prove, that the loſs happened in the particular manner declared on. But Lord Chief Juſtice *Lee* ſaid, it would be unreaſonable to expect certain evidence of ſuch a loſs, where every body on board is preſumed to be drowned: and all that can be required is the beſt proof the nature of the caſe admits of, which the plaintiff has given. Green v. Brown, 2 Stra. 1199.

CHAP. III. He therefore left it to the jury, who found according to the plaintiff's declaration.

Newby v. Read, Sittings after Michaelmas, 3 Geo. III. [64]

The ſame doctrine was held in a more modern caſe before Lord *Mansfield*. It was an action of covenant on a deed, in the nature of a policy of inſurance, by which the defendant was bound to inſure againſt any loſs happening before the 30th of *November* 1762, free from average. The ſhip ſailed from *Newcaſtle* to *Copenhagen*, which is uſually about ten days voyage. She was ſoon after taken by a *French* privateer, but ranſomed; and ſhe then proceeded on her voyage to *Copenhagen* (as was proved by the ranſomers) in a bad condition. She was never heard of afterwards, though all due diligence had been uſed; and ſeveral ſhips, which ſailed after her, were proved to have arrived ſafe at *Copenhagen*.

Lord *Mansfield* told the jury, that this evidence was a ſufficient ground to preſume that ſhe periſhed at ſea, unleſs the contrary appeared. The jury accordingly found for the plaintiffs.

I have not been able to find any regulation in the law of *England*, or the uſage of merchants, fixing a limited time, within which the aſſured may demand payment for his loſs, in caſe no accounts arrive of the ſhip, upon which inſurance is made. Indeed, from the nature of the thing, what ſhall be a reaſonable time, in ſuch caſes, muſt always depend upon a variety of obvious circumſtances. I underſtand, however, a practice has prevailed among inſurers, which ſeems reaſonable enough, that a ſhip ſhall be deemed loſt, if not heard of in ſix months after her departure, (or after the time of the laſt intelligence from her) for any part of *Europe*; and in twelve months, if for a greater diſtance. The only objection to ſuch a practice is, that the latter period does not ſeem ſufficient in *India* voyages. However, that is a matter for the inſurer's conſideration; and even if he ſhould pay the money under a miſtake, ſuppoſing the ſhip loſt, when it really is not, he might, as we ſhall ſee hereafter, if the inſured were unwilling

Vide poſt, c. 20.

willing to refund, recover it back, in an action for money had and received to his uſe. CHAP. III.

In *Spain* and *France*, this matter, however, is not left to uncertainty; but the time, within which ſuch *loſſes* may be demanded, is fixed and aſcertained by expreſs regulations. By the ordinances of the former, if any ſhip inſured on going to, or coming from the *Indies*, is not heard of in a year and a half after her departure from the port where ſhe loaded, it is declared that ſhe is, and ſhall be deemed loſt: by thoſe of the latter it is ſaid, that if the inſured receive no news of his ſhip, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for thoſe at a greater diſtance, make his ceſſion to the underwriters, and demand payment, without being obliged to produce any certificate of the loſs.

2 Magens 33.

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2 Magens 177. Ord. of Lewis 14. l. 31. art. 58.

CHAPTER THE FOURTH.

Of Loſſes by Capture and Detention of Princes.

CHAP. IV.

CAPTURE, as applied to the ſubject of marine inſurances, may be ſaid to be a taking of the ſhips or goods belonging to the ſubjects of one country, by thoſe of another, when in a ſtate of public war. What ſhall be conſidered as a capture, ſo as to render an inſurer liable under a policy, inſuring againſt captures, has now become a queſtion of very little difficulty.

2 Burr. 694. 1ſt point in Goſs v. Withers.

The law upon this ſubject is perfectly ſettled in *England*, between the inſurer and the inſured; and it is this, that the ſhip is to be conſidered as loſt by the capture, though ſhe be never condemned at all, nor carried into any port or fleet of the enemy: and the inſurer muſt pay the value. If, after a condemnation, the owner recover or retake her, the inſurer can be in no other condition, than if ſhe had been retaken or recovered before condemnation. The inſurer runs the riſk of the inſured, and undertakes to indemnify; he muſt therefore bear the *loſs*, actually ſuſtained, and can be liable to no more. So that if, after condemnation, the owner recovers the ſhip in her complete condition, but has paid ſalvage, or been at any expence in getting her back, the inſurer muſt pay the loſs ſo actually ſuſtained. No capture by the enemy can be ſo total a loſs, as to leave no poſſibility of recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by late acts of parliament, if an *Engliſh* ſhip retake the veſſel captured, either before or after condemnation, the owner is entitled to reſtitution upon ſtated ſalvage. This chance does not, however, ſuſpend the demand for a total loſs upon the inſurer: but juſtice is done, by putting him in the place of the inſured, in caſe of a recapture.

2 Burr. 696.

29 Geo. II. c. 34. ſ. 24. 33 Geo. III. c. 66. ſ. 42.

Theſe principles, which are agreeable to the ideas of foreign writers, were ſettled by Lord *Mansfield*, and the whole court of King's Bench, in *Goſs* againſt *Withers*, (which will be cited at length when we come to treat of abandonment), and which have never ſince been diſputed. It has likewiſe been held, that where a capture has been made, whether it be legal or not, the inſurers are liable for the charges of a compromiſe made *bonâ fide*, to prevent the ſhip from being condemned as prize. It is true, the only caſe I have been able to find where this point came directly in queſtion is a *niſi prius* note; but when we conſider the high authority from which this doctrine is taken, and that the thing in itſelf is not at all repugnant to the general principles of the law of inſurance, it certainly has a claim to our attention.

Rocci Selecta reſponſa, Reſp. 34.

2 Burr. 683.

It was an action on a policy of inſurance on a *Dutch* ſhip, called the *Tyd*, and its cargo, at and from *Saint Euſtatius* to *Amſterdam*, warranted a *Dutch* ſhip, and the goods *Dutch* property, and not laden in any *French* port in the *Weſt Indies*. The cargo was worth 12,000 *l.* and was inſured at a premium of fifteen guineas *per cent.* which was advanced to this high rate, on account of the number of captures made by the *Engliſh*, of neutral veſſels, on ſuſpicion of illicit trade, and the detention of thoſe veſſels, by the proceedings in the courts of admiralty. The defendant underwrote 82 *l.* of the plaintiff's, for a premium of 12 *l.* 18 *s.* 3 *d.* In *May* 1758, the ſhip was at *Saint Euſtatius*, taking in her cargo, which conſiſted of ſugar and indigo, and other *French* commodities, which were put on board her, partly out of barks from ſea, partly from the ſhore of the iſland. On the 18th of *June* 1758, ſhe ſailed on her voyage; on the 27th ſhe was taken by an *Engliſh* privateer, and carried into *Portſmouth*. On the 1ſt of *Auguſt*, the ſailors were examined upon the ſtanding interrogatories, preſcribed by the ſtatute 29 *Geo.* II. *c.* 34. and the captain entered his claim in the Admiralty court. In *October* 1758, the claimants were cited to ſpecify what part of the goods was taken from the ſhore of *Saint Euſtatius*, and what from the barks. Citation was continued from

Berens v. Rucker. 1 Black. 313.

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from court to court till *February* 1759, when an interlocutory decree was pronounced for the contumacy of the claimants in not ſpecifying, and that therefore the goods ſhould be preſumed *French* property. There was an appeal to the lords commiſſioners of prizes: but as many cauſes ſtood before it, as the market was very high, and as the cargo was in part periſhable, the agent of the owners agreed with the captors to give them 800 *l.* and coſts, to obtain the reverſal of the ſentence. The reverſal was had by conſent, and, in order to give coſts to the captor, it was decreed by conſent, that there was a ſufficient cauſe for ſeizure; and thereupon coſts were decreed to the captors, and reſtitution of the cargo to the owners was alſo ordered. The ſhip, when reſtored, proceeded to *Amſterdam*; and after her arrival there, the Chamber of Inſurances in that city ſettled the average of the plaintiff towards the loſs and expences at 14 *l.* 3 *s.* 8 *d.* occaſioned by the capture, detention, and litigation; and for this ſum the action was brought.

Lord *Mansfield*.—"The firſt queſtion is, whether this was a juſt capture? Both ſentences are out of the caſe, being done and undone by conſent. The capture was certainly unjuſt. The pretence was, that part of this cargo was put on board off *Saint Euſtatius*, out of barks, ſuppoſed to come from the *French* iſlands, and not loaded immediately from the ſhore. This is now a ſettled point by the Lords of Appeal, to be the ſame thing as if they had been landed on the *Dutch* ſhore, and then put on board afterwards; in which caſe there is no colour for ſeizure. The rule is, that if a neutral ſhip trade to a *French* colony, with all the privileges of a *French* ſhip, and is thus adopted and naturalized, it muſt be looked upon as a *French* ſhip, and is liable to be taken. Not ſo, if ſhe have only *French* produce on board, without taking it in at a *French* port; for it may be purchaſed of neutrals.

Second queſtion is, whether the owners have acted *bona fide*, and uprightly, as men acting for themſelves, and upon a reaſonable footing; ſo as to make the expences of this compromiſe

compromiſe a loſs to be borne by the inſurers. The order of the judge of the Admiralty to ſpecify was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; becauſe if they had ſpecified, it could be of no conſequence, according to the rule I before mentioned. The captors were, however, in poſſeſſion of a [69] ſentence, though an unjuſt one: and a court of appeal cannot, or ſeldom does, upon a reverſal, give coſts or damages, which have accrued ſubſequent to the original ſentence; for theſe damages ariſe from the fault of the judge, not of the parties. Under all theſe circumſtances, therefore, the owners did wiſely to offer a compromiſe. The cargo was worth 12,000 *l.* the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negotiated the compromiſe; the Chamber of Commerce at *Amſterdam* ratified it, and thought it reaſonable. Had the whole ſentence been totally reverſed, the coſts muſt have ſat heavy on the owners. I therefore think the inſurers liable to anſwer this average loſs, which was ſubmitted to, in order to avoid a total one." The jury found for the plaintiff, agreeably to the above direction (*a*).

By the poſitive proviſions of two acts of parliament, 22 *Geo.* III. *c.* 25. and 33 *Geo.* III. *c.* 66. *ſ.* 37, 38, and 39, it is declared illegal for the captains or owners of any *Britiſh* ſhips who are captured, to ranſom themſelves from the enemy, and the contract to ranſom is not only declared abſolutely void, but the parties entering into them are puniſhed by fine. It would follow as a neceſſary conſequence that no ſum paid on ſuch account could be recovered from the underwriters.

Upon this principle the following deciſion lately took place. The ſhip *Themis* was inſured for 12 months, and during that period was captured and carried into *Bergen* in *Norway*, and there condemned by the *French* conſul. After this ſentence, the ſhip was put up to publick auction at *Bergen*,

Havelock v. Rockwood, 8 Term R. 268. See S. C. poſt, ch. 9 & 18. on another point.

(*a*) In Tyſon v. Gurney, 3 Term R. 477. this caſe was quoted without contradiction; and the point, in ſupport of which it was adduced, was held accordingly.

by

CHAP. IV.

by the publick officer of the court of *Denmark*, having been previouſly advertized, and was repurchaſed by the agent of the plaintiff; and for this repurchaſe money the plaintiff inſiſted (if not entitled to recover as for a total loſs), he was at all events entitled to a verdict.

The court, after hearing two arguments, were unanimouſly of opinion, that as the ſentence of the *French* conſul in a neutral country was contrary to the law of nations, and void, the property never was diveſted out of the original owner; and that therefore the money paid for the repurchaſe was in the nature of a ranſom. The ranſom acts are remedial laws, and in the conſtruction of ſuch acts, it is the rule to extend the remedy ſo as to meet the miſchief; and the legiſlature intended to prevent ſuch a tranſaction as the preſent taking place, becauſe it would take away the chance of recapture. The circumſtances of this being done *by an agent*, at an *auction*, and *on* land, were deemed immaterial, the acts of parliament not having deſcribed at what places, or in what form a ranſom is prohibited, but having prohibited ranſom in general terms, the caſe was thought to come within the miſchiefs againſt which thoſe ſtatutes were meant to guard.

As to the diſcuſſion of this point, ſee poſt, ch. 18.

But though the law upon the ſubject of capture in inſurances is ſo clearly defined, that at this day it ſeems almoſt impoſſible to raiſe a queſtion, yet it formerly occaſioned much doubt and litigation, what effect a recapture might have upon this kind of contract; and how long it was neceſſary for goods to remain in the hands of the enemy, in order to diveſt the original proprietor of his property in caſe of a recapture.

All theſe doubts are now entirely removed, and can never again be agitated in this country, between an inſurer and inſured: Lord *Mansfield*, for himſelf and his brethren, having declared, in giving judgment in *Goſs* v. *Withers*, that theſe queſtions could never have been ſtarted in policies *upon real intereſt*, becauſe, as we have ſeen, they never could have varied the caſe. But wager policies gave riſe to them; for it was neceſſary to ſet up a total loſs, as between third perſons, for

2 Burr. 695.

Vide beginning of this chap.

the purpose of their wager, though *in fact* the ſhip was ſafe, and reſtored to the owner. His Lordſhip laid down the ſame doctrine in *Hamilton* v. *Mendez*; the conſequence of which is, that as wager policies are now expreſsly prohibited by ſtatute, theſe queſtions can never ariſe upon a policy of inſurance. CHAP. IV. 2 Burr. 1198. 19 Geo. II. c. 37.

The only two poſſible caſes, in which they can be material, are: 1ſt, Between the owner and a neutral perſon who has bought the capture from the enemy: and, 2dly, Between the owner and recaptor: But whatever rule ought to be followed in favour of the owner, againſt a recaptor or vendee, it can no way affect the inſurance between the inſurer and inſured. 2 Burr. 693. [70]

Notwithſtanding this point is now, as far as relates to our preſent enquiry, no longer a ſubject of uncertainty, it cannot but afford pleaſure to the mind, and, I truſt, it will not be conſidered as impertinent, to trace the opinion of foreign writers upon this queſtion, and to ſtate briefly ſeveral caſes which have been decided in our courts of law here, upon capture and recapture, previous to the ſtatute of 19 *Geo.* II.

It ſeems to be generally agreed by foreign writers, that it is not every taking and ſubſequent poſſeſſion under that taking, which will conſtitute a capture in the legal ſenſe of the word, or make it become the property of the captor; but that there muſt be a firm poſſeſſion. In this they all agree; but what ſhall be ſuch a poſſeſſion, as to veſt the abſolute property in the captor, is ſo much a matter of doubt, that it is difficult to find two writers of the ſame opinion. Upon this ſubject various lines have been drawn by arbitrary rules, partly from policy, to prevent too eaſy diſpoſitions to neutrals; and partly from equity, to extend the *jus poſtliminii* in favour of the owner. And it is not to be wondered at, that there is ſo great an uncertainty and variety of notions amongſt the writers on this ſubject, about fixing a poſitive boundary by the mere force of reaſon, where the ſubject matter is arbitrary, and not the object of reaſon alone. 2 Burr. 693.

Grotius

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Grotius is of opinion, that the captor ſhall be ſaid to have the property in him, as ſoon as the former owner ſhall have loſt the hope of recovery, and the ability to purſue, and that property ſhall then be ſaid to be *taken*, when it is brought within the enemy's fortreſs. Whence it follows as a conſequence, that in marine captures, the capture ſhall be deemed complete, when the ſhips or goods taken ſhall be brought within the harbour or ports of the enemy, or to that place where their whole fleet is ſtationed; for then the recovery may be deſpaired of. But by a more recent law introduced among the *European* nations, it ſeems, that, that only is deemed a capture, which has been twenty-four hours in the poſſeſſion of the captor. The former part of this opinion, I find, was adopted in a caſe in *March*'s Reports, where it is ſaid, that the property is not altered, unleſs it be brought *infra præſidia* of the enemy: and ſome nations have made twenty-four hours quiet poſſeſſion by the enemy the criterion of their judgment. Thus by the ordinances of *Lewis* the fourteenth it is declared, that if any of the ſhips of *French* ſubjects be retaken from their enemies, after having been twenty-four hours in their hands, they ſhould be good prize; and if it be before twenty-four hours, they ſhall be reſtored to the owners, with all that is in them, and one third ſhall be given to the ſhip that retakes them. *Bynkerſhoek*, however, ſtates the opinion of *Grotius*, controverts it with much ability, and ſeems to think, that the *ſpes recuperandi* is the ground on which the queſtion is to be decided. He mentions the opinion of ſome writers, who think, that it is neceſſary for the ſhip to have arrived in the enemy's port, to have been condemned, to have ſailed out again, and arrived in a friend's port, before the property can be ſaid to be changed. *Roccus* rather ſtates the various opinions of others, than aſſerts one of his own; but he ſeems to lean to the idea, that it is neceſſary to bring the ſhip within the confines of the captor, and to keep it there a night in ſafe cuſtody. But as was ſaid by Lord *Mansfield*, all theſe circumſtances are very arbitrary, and therefore are generally exploded.

Grotius de jure belli, lib. 3. c. 6. ſ. 3.

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March 110.

Ord. of Lew. ſ. 34. art. 8.

Bynkerſhoek quæſt. publ. juris, lib. 1. c. 4.

Roccus Not. 66. 2 Black. Com. 401.

2 Burr. 694.

By.

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By the marine law of *England*, as practiſed in the court of Admiralty, previous to the paſſing of any act of parliament, which commanded reſtitution, or fixed the rate of ſalvage, it was held, that the property was not changed ſo as to bar the owner in favour of a vendee or recaptor, till there had been a ſentence of condemnation. Agreeably to this principle, judgment was given in that court, decreeing reſtitution of a ſhip retaken by a privateer, though ſhe had been fourteen weeks in the enemy's poſſeſſion. Another caſe alſo, upon the ſame principle, was decided againſt the vendee after a long poſſeſſion, two ſales, and ſeveral voyages. 2 Burr. 694.

Thus ſtands the marine law of *England*, by which it appears, that the *jus poſtliminii* continues till condemnation, which, by the acts of parliament about to be quoted, is extended, and now continues for ever. [72]

By the ſtatutes of the 13th *Geo.* II. c. 4. and 29th *Geo.* II. c. 34. ſhips or veſſels of his majeſty's ſubjects, which had been captured by the enemy, and were retaken, either by men of war or privateers, were decreed to be reſtored to the original owners, upon paying for ſalvage the ſums mentioned in the ſtatutes, and the quantum of ſalvage to be paid to privateers was made to depend upon the length of time which the re-captured veſſel had been in the enemy's hands; ſuch ſalvage, however, never being allowed to exceed a moiety of the value.

By the laſt prize act this diſtinction is aboliſhed, and the rate of ſalvage payable in all caſes is fixed to one eighth of the value, if the re-capture is made by any of his majeſty's ſhips, and to one ſixth, if by a privateer, or other ſhip. 33 Geo. III. c. 66.

The words of this clauſe of the ſtatute are, "that if any "ſhip or veſſel, or boat taken as prize, or any goods therein, "ſhall appear and be proved, in any court of admiralty having "a right to take cognizance thereof, to have belonged to any "of his majeſty's ſubjects of *Great Britain* or *Ireland*, or any "of the dominions and territories remaining and continuing § 42.

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" under his majeſty's protection and obedience, which were
" before taken or ſurprized by any of his majeſty's enemies,
" and at any time afterwards again ſurprized and retaken by
" any of his majeſty's ſhips of war, or any privateer, or other
" ſhip, veſſel, or boat, under his majeſty's protection and obe-
" dience, that then ſuch ſhips, veſſels, boats, and goods, and
" every ſuch part and parts thereof as aforeſaid, formerly be-
" longing to ſuch his majeſty's ſubjects, ſhall in all caſes
" (ſave in ſuch as are hereafter excepted) be adjudged to be
" reſtored, and ſhall be, by decree of the ſaid court of ad-
" miralty, accordingly reſtored to ſuch former owner or
" owners, or proprietors, he or they paying for and in lieu of
" ſalvage (if retaken by any of his majeſty's ſhips) one-eighth
" part of the true value of the ſhips, veſſels, boats, and goods
" reſpectively, ſo to be reſtored, which ſaid ſalvage of one-
" eighth ſhall be anſwered and paid to the flag officers, cap-
" tains, officers, ſeamen, marines, and ſoldiers, in his ma-
" jeſty's ſaid ſhip or ſhips of war, to be divided in ſuch man-
" ner as before in this act is directed touching the ſhare of
" prizes belonging to the flag officers, captains, officers,
" ſeamen, marines, and ſoldiers, where prizes are taken by
" any of his majeſty's ſhips of war; and if retaken by any
" privateer, or other ſhip, veſſel, or boat, one-ſixth part of
" the true value of the ſaid ſhips, veſſels, boats, and goods;
" all which payments to be made to the owner or owners,
" officers and ſeamen of ſuch privateer, or other ſhip, veſ-
" ſel, or boat, ſhall be without any deductions, and ſhall be
" divided in ſuch manner and proportions as ſhall have been
" agreed on by them as aforeſaid; and in caſe ſuch ſhip,
" veſſel, or goods, ſhall have been retaken by the joint ope-
" ration or means of one or more of his majeſty's ſhips,
" and one or more private ſhip or ſhips, then the judge of
" the High Court of Admiralty, or other court having
" cognizance thereof, ſhall order and adjudge ſuch ſalvage
" to be paid to the re-captors, by the owner or owners of
" ſuch retaken ſhip, veſſel, or goods, as he ſhall, under the
" circumſtances of the caſe, deem fit and reaſonable, which
" ſalvage ſo to be adjudged ſhall be accordingly paid by the
" owners of ſuch retaken ſhip, veſſel, or goods, to the
" agents

" agents of the re-captors, in ſuch proportions as the ſaid " court ſhall adjudge; but if ſuch ſhip or veſſel ſo retaken " ſhall appear to have been, after the taking by his majeſty's " enemies, by them ſet forth as a ſhip or veſſel of war, the " ſaid ſhip or veſſel ſhall not be reſtored to the former " owners or proprietors, but ſhall in all caſes, whether re- " taken by any of his majeſty's ſhips, or by any privateer, " be adjudged lawful prize for the benefit of the captors."

From hence it is clear, that by the marine law received and practiſed in *England*, there is no change of property, in caſe of a capture, before condemnation; and that now, by the act of parliament juſt recited, in caſe of a recapture, the *jus poſtliminii* continues for ever, unleſs the ſhip ſo retaken ſhall appear to have been ſet forth by his majeſty's enemies as a ſhip of war, in which caſe ſhe ſhall be deemed good prize to the recaptors. However, as has been already ſaid, the change of property is not at all material as between the inſurer and inſured, upon policies of real intereſt, which are the only policies that can now by law be effected.

I proceed then to ſtate the caſes, which were determined upon this point, on wager policies, previous to the act of parliament, prohibiting ſuch inſurances.

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The firſt caſe is one in the 10th year of Queen *Anne*'s reign, in which the facts upon a ſpecial verdict appeared to be, that the plaintiff had inſured a certain ſum of money upon a ſhip, called the *Ruth*, in a certain voyage, *in which ſhip the plaintiff was found not to be at all intereſted.* It happened that this ſhip was taken by the enemy, and kept in their poſſeſſion for nine days, and then before it was carried *infra præſidia*, it was retaken by an *Engliſh* man of war. Upon theſe facts, the queſtion was, whether or not this was ſuch a taking as ſhould enable the plaintiff to recover the ſum inſured againſt the defendant.

Aſſievedo v. Cambridge, 10 Mod. 77.

After argument, the court ſeemed to think (but a ſecond argument was ordered, which does not appear from any re-

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whether the capture of this ſhip, which was never carried *infra præſidia hoſtis* before ſhe was retaken, and upon the matter as found by the verdict, ſhall be conſidered as a total loſs, ſo as to entitle the inſured to recover the whole ſum inſured. And although by the civil law it may not perhaps be adjudged a total loſs, yet the rules of that law are not to govern us, but we muſt give our judgment according to the common law of *England*, and upon this agreement between the parties, whoſe intention appears, and muſt guide us. By the civil law, there muſt be a total loſs to entitle the aſſured to recover, but the policy in this caſe extends to captures and other accidents. The meaning of the parties here is plain; the inſured paid his premium in conſideration of the inſurer's undertaking, that the *Salamander* ſhould cruiſe ſafely during three months; the jury have found that ſhe was diſabled from proſecuting her cruiſe for three months. We are all of opinion for the plaintiff, and that this is not an average, but a total loſs to the inſured: the inſurance is to be underſtood for the voyage of three months, and in common ſenſe it cannot be otherwiſe; ſo that as ſoon as the voyage is broken or interrupted, it is at an end. Safety during the three months is what is meant; but it appears that the ſhip was taken and detained within that time, and that the plaintiff was hindered in his cruiſe; and this, by our law, is a total loſs to the plaintiff. I have avoided ſaying any thing whether this was a prize or not, as having never been carried *infra præſidia hoſtis*, becauſe we are all of opinion, that this is a total loſs." Judgment for the plaintiff.

Spencer v. Franco coram Lord Hardwicke, Dec. 1736. Lex Merc. red. 4th edit. p. 316.

In the caſe of *Spencer* v. *Franco*, the plaintiff had cauſed himſelf to be inſured on the *Prince Frederick* from *Vera Cruz* to *London*, *intereſt or no intereſt*, free of average, and without benefit of ſalvage. The ſhip was afterwards ſeized by order of the viceroy of *Mexico*, and the *Spaniards* turned her into a man of war, called the *Saint Philip*, and ſent her as commodore, with a ſquadron of *Spaniſh* men of war, to the *Havannah*, they having firſt taken out the *South Sea* Company's arms, and made ſeveral alterations in her, and there was a war between *England* and *Spain*, and *Gibraltar* was actually beſieged by the *Spaniards*. The defendants

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proved the ſigning of preliminary articles of peace before the ſeizure of the ſhip, and therefore inſiſted, that this ſeizure did not alter the property, and conſequently the defendants were not liable: for if the property was not altered, this inſurance made by the plaintiff, who had no intereſt, cannot bind, as nothing comes within the policy but a total loſs; and though there be thoſe general words in the policy, *reſtraint, or detainment of princes*, Lord Chief Juſtice *Hardwicke* declared, that a war might begin without an actual declaration or proclamation, as in this caſe, by laying ſiege to *Gibraltar*, a garriſon town; that as a war may begin by hoſtilities only, ſo it may end by a ceſſation of arms; and theſe preliminary articles being ſigned before the ſeizure of the ſhip, and there being a ceſſation of arms, he thought the ſhip being taken afterwards, not to be a taking by enemies, unleſs the jury took the caption to begin from the time the *South Sea* arms were ſeized, which was before the articles: that ſuppoſing the ſhip not taken by enemies, whether his detention for near the ſpace of a year was, in this ſort of policies, *viz. intereſt or no intereſt*, a detention within the policy; or whether in ſuch policies the inſurers are ever liable, but in caſe of a total loſs; and if ſo, this ſhip being afterwards reſtored, then he directed the jury to find for the defendants, which they accordingly did.

In another caſe, the inſurance was on goods by the *Durſley* galley, *intereſt or no intereſt*, at and from *Jamaica* to *Briſtol*. In her paſſage ſhe was taken by a *Spaniſh* privateer, and carried into *Mores*, a port in *Spain*, kept eight days, and then cut out by an *Engliſh* ſhip. The plaintiff inſiſted, that this inſurance, though on goods, was to be conſidered as a wager on the bottom of the ſhip; and therefore brought his action for a total loſs. The defendant ſaid, that by the ſtat. of 13 *Geo.* II. *c.* 4. the ſhip is to be reſtored to the owners upon paying ſalvage, and conſequently this is only an average loſs; and the plaintiff can only recover upon a total one. Lord Chief Juſtice *Lee* held, that the plaintiff ought to recover: for this is a wager upon a total loſs in the voyage, and here has happened one; for being carried into port and detained

Dean v. Dicker, 2 Stra. 1250.

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eight days makes one. Where the policy is, "*intereſt or no* "*intereſt*," the proviſions of the act in caſes of valued policies cannot take place. The act does not declare that the property is not gone by ſuch a capture, but only provides for reſtoring the ſhip to whom it did, and ſhall be proved to have belonged. He ſaid, it might be otherwiſe, where the ſhip was recaptured, before it was carried *infra præſidia*, or in caſe of goods actually on board, and upon a valued policy.

Whitehead v. Bance, B. R. Mich. 1749.

An inſurance was made on the *Diſpatch* galley, *intereſt or no intereſt*, free of average, *&c.* from *Jamaica* to *Hull*. In her voyage ſhe was taken by a *French* privateer, and carried to *Hamburgh*, and after being twelve days in the hands of the enemy, ſhe was retaken by an *Engliſh* ſhip, and brought to *London*, where ſhe was adjudged to be reſtored to the owner, paying ſalvage. The owner ſold the ſhip, and paid the ſalvage. An action being brought on the policy, it was held to be a loſs of the voyage; and a verdict was given accordingly.

Theſe caſes have been laid before the reader, without any comments, except ſuch as have occurred from time to time, to Lord *Mansfield*, as he has had occaſion to mention them; and it was the leſs neceſſary to obſerve upon each particular caſe, as one general obſervation is applicable to all, namely, that they were not policies upon *real intereſt*. Let it ſuffice then to repeat, that, at this day, in caſes of capture, the underwriter is immediately reſponſible to the inſured. But if the ſhip be recovered before a demand for indemnity, the inſurer is only liable for the amount of the loſs actually ſuſtained at the time of the demand: or if the ſhip be reſtored at any time ſubſequent to the payment by the underwriter, he ſhall then ſtand in the place of the inſured, and receive all the benefits and advantages reſulting from ſuch reſtitution. All theſe regulations certainly have their foundation in the great principles of equity and juſtice; an obſervation which muſt be obvious to every one who recollects, that a policy of inſurance is nothing more than a contract of indemnity.

Before

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Before the ſubject of capture and recapture is cloſed, it may be proper to mention, that by the late prize act, if a ſhip be retaken before ſhe has been carried into an enemy's port, it ſhall be lawful for her, with conſent of the recaptors, to proſecute her voyage, and it ſhall not be neceſſary for the recaptors to proceed to an adjudication till ſix months, or till her return to the port from which ſhe ſailed; and it ſhall be lawful for the maſter, owners, &c. with conſent of the recaptors, to unliver and diſpoſe of the cargo before adjudication: and in caſe the veſſel ſhall not return directly to the port from which ſhe ſailed, or the recaptors ſhall have had no opportunity of proceeding to adjudication within the ſix months, on account of the abſence of the ſaid veſſel, the Court of Admiralty ſhall, at the inſtance of the recaptors, decree reſtitution to the former owners, paying ſalvage, upon ſuch evidence as to the ſaid court, under all the circumſtances of the caſe, ſhall appear reaſonable, the expence of ſuch proceeding not to exceed the ſum of fourteen pounds. 33 Geo. III. c. 66. ſ. 44.

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Having thus endeavoured to explain the nature of captures by an enemy, as far as they affect the ſubject of inſurances, I proceed now to treat of loſſes ariſing from another ſpecies of capture, namely, by detention; a part of our enquiry which will not demand a long or tedious diſcuſſion. The underwriter, by the expreſs terms of his contract, is anſwerable for all loſs or damage ariſing to the inſured, "*by the arreſts, re-*"*ſtraints, and detainments of all kings, princes, and people, of*"*what nation, condition, or quality whatſoever.*"

The only queſtion then is, what ſhall be conſidered as ſuch detention: and indeed the words uſed are ſo large and comprehenſive, as hardly to admit of a doubt even upon that head. The learned *Roccus* is of opinion "*ut ſi merces captæ*"*a poteſtate, ſeu judice juſtitiam adminiſtrante in illo loco, aut*"*a populo, aut ab aliâ quâcunque perſonâ per vim, abſque pretii*"*ſolutione, tenentur aſſecuratores ſolvere æſtimationem dominis*"*mercium, factâ prius per dominos mercium ceſſione ad benefi-*"*cium aſſecuratorum pro recuperandis illis mercibus, vel pretio*"*ipſorum a capientibus.*" In another place he ſays, "*Regis*"*&* Roccus de aſſec. Not. 54.

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Roccus de aſſec. Not. 65.

" *& principis factum cannumeratur inter caſus fortuites; ideo ſi* " *rex et princeps retineant navem oneratam frumento ex cauſâ* " *penuriæ, quapropter navis non potuerit frumenta aſportare ad* " *locum deſtinatum, tenentur aſſecuratores.*"

Malyne 110.

Malyne lays down the law to be, that the inſurers are liable for all loſſes by arreſts, detainments, &c. happening both in time of war and peace, committed by the public authority of princes. And Lord *Mansfield* has ſaid, that the inſured may abandon in caſe merely of an arreſt or embargo by a prince, not an enemy; and conſequently ſuch an arreſt is a loſs within the meaning of the word *detention*.

3 Bur. 696.

Neſbitt and another v. Luſhington, 4 Term R. 783.

What the word "*people*," in this clauſe of a policy of inſurance, means, has lately been judicially ſettled in a caſe, where the declaration claimed a loſs of corn, occaſioned *by the unlawful arreſt, reſtraint, and detention of people to the plaintiffs unknown.* The facts upon this part of the caſe were, that the ſhip being forced into *Elly Harbour*, in *Ireland*, and a great ſcarcity of corn happening to be there at that time, the people came on board in a tumultuous manner, took the government of the veſſel from the captain and crew, weighed her anchor, by which ſhe drove upon a reef of rocks, and would not leave her, till they had compelled the captain to ſell almoſt all the corn conſiderably below the invoice price. The word *people*, it was contended at the bar, meant individuals of a nation as oppoſed to magiſtrates or rulers.

Lord *Kenyon*.—" That which happened in this caſe does not fall within the meaning of " arreſts, reſtraints, and de- " tainments of kings, princes, and people." The meaning of the word *people* may be diſcovered here by the accompanying words, *noſcitur a ſociis*; it means, " *the ruling power* " *of the country.*"

Mr. Juſtice *Buller*.—" I cannot agree with the conſtruction put at the bar upon the word, *people*; it means *the ſupreme power*; *the power of the country*, whatever it may be. This appears clear from another part of the policy; for

where

where the underwriters insure against the wrongful acts of individuals, they describe them by the names of "*pirates*, "*rogues*, *thieves*:" then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of "kings, princes, and "*people*, of what nation, condition, or quality soever." Those words, therefore, must apply to *nations* in their collective capacity."

An embargo is an arrest laid on ships or merchandize by publick authority, or a prohibition of state commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. This term has also a more extensive signification, for ships are frequently detained to serve a prince in an expedition, and for this end have their loading taken out, without any regard to the colours they bear, or the princes to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports, that may contribute to the success of his enterprise. Embargoes laid on shipping in the ports of *Great Britain*, by royal proclamation, *in time of war*, are strictly legal, and will be equally binding, as an act of parliament; because such a proclamation is founded on a prior law, namely, that the king may prohibit any of his subjects from leaving the realm. But in times of peace the power of the king of *Great Britain* to lay such restraints is doubtful; and therefore where such a proclamation issued in the year 1766, against the words of a statute then in force, although absolutely necessary for the prevention of a dearth in this country, it was thought prudent to procure an act of the legislature to indemnify those who advised, or who acted under, that proclamation.

Lex Merc. red. 4th edit. 260.

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Grot. de jure belli, lib. 2. cap. 2. s. 10. 1 Black. Com. 270.

7 Geo. III. c. 7.

In case of detention by a foreign power, which in time of war may have seized a neutral ship at sea, and carried it into port to be searched for enemy's property, all the charges consequent thereon must be borne by the underwriter: and whatever

1 Magens 67.

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ever coſts may ariſe from an improper detention, muſt always fall upon him.

Saloucci v. Johnſon, B. R. Hil. 25 Geo. III.

This was held by *Willes*, *Aſhhurſt*, and *Buller*, juſtices, in the abſence of Lord *Mansfield*, in a caſe, the circumſtances of which are as follows: It was an inſurance on the ſhip *Thetis*, a neutral ſhip; and upon the trial, a ſpecial caſe was reſerved for the opinion of the court, ſtating, that the plaintiffs were *Tuſcan* ſubjects, reſident at *Leghorn*, ſole owners of the ſhip *Thetis*, which ſailed from *Leghorn*, and was captured by a *Spaniſh* ſhip off the coaſt of *Barbary*, with neutral goods on board, conſigned to *London*. She was condemned as prize in the court of Vice Admiralty in *Spain*, which ſentence was reverſed; but upon another appeal to a ſuperior court, the latter ſentence was alſo reverſed, and the former confirmed. The grounds of condemnation were two: 1ſt. That the ſhip *Thetis* refuſed to be ſearched, and reſiſted with force, having fired at the *Spaniſh* ſhip: 2dly. That ſhe had
[80] no charter party on board. The captain of the *Thetis* anſwered theſe two grounds: 1ſt. that he reſiſted and fired, becauſe the *Spaniard* hailed him under falſe colours: 2dly. that he had taken the goods on board by the piece, and had not freighted his ſhip to any individual; in which caſe a manifeſto was ſufficient without a charter party. The ſentence of the laſt court of appeal, although it condemns, admits the neutrality, for it ſtates the veſſel to be "*a Tuſcan ſhip.*" The laſt ground relative to the charter party was not inſiſted upon. Upon the other, the three learned judges above mentioned were of opinion, *that a neutral ſhip is not obliged to ſtop to be ſearched* (*a*); that the captain had not been guilty of barratry; that the ſearcher ſtops a neutral ſhip at his peril; that this was to be conſidered as a caſe of improper detention, and conſequently that the plaintiff upon this policy was entitled to recover.

(*a*) This opinion of the learned judges does not ſeem to be well founded. But I ſhall hereafter ſtate the argument more at length, in chap 18, when I ſhall have occaſion to refer to a very learned and elaborate judgment of Sir *W. Scott*, the judge of the admiralty, upon this point.

But

But though an underwriter is liable for all damage arising to the owner of the ſhip or goods from the reſtraint or detention of princes, yet that rule ſhall not be extended to caſes where the inſured ſhall navigate againſt the laws of thoſe countries, in the ports of which he may chance to be detained, or to caſes where there ſhall be a ſeizure for non-payment of cuſtoms. This was ſo ruled by Lord Commiſſioner *Hutchins* in Chancery, in the year 1690; and the reaſon of it is obvious, becauſe there is a groſs fraud on the part of the owner of the property inſured; and no man ſhall take advantage of his own miſconduct. If indeed any of thoſe acts were committed by the maſter of the ſhip, without the knowledge of the inſured, the underwriter would be liable, if not for loſſes by detention, at leaſt for a loſs by the barratry of the maſter, to which ſuch conduct would moſt certainly amount. 2 Vern. 176. Vide the next chapter.

It has been a queſtion, whether the inſurers are liable for the payment of damage ariſing by the detention or ſeizure of ſhips by the government of the country in whoſe ports the ſhip loads. Till lately there was only one common law caſe where this point was expreſsly in iſſue, and that was not decided.

In evidence upon the trial in an action upon a policy of inſurance, the caſe appeared to be, that the inſurer agreed to inſure the ſhip from her arrival at ——— in *Jamaica* during her voyage to *London*; and an embargo was laid upon the ſhip by the government; who afterwards ſeized the ſhip, converted her into a fireſhip, and offered to pay the owners. The queſtion was, if this would excuſe the inſurers? *Holt*, Chief Juſtice, ſeemed to incline, that it would not, and that this was within the words, *detention of princes*, &c. but he gave no abſolute opinion, the cauſe having been referred to three of the jury. Green v. Young, 2 Ld. Raym. 840. 2 Salk. 444. [81]

The very general words made uſe of in policies go to ſupport the idea entertained by Lord *Holt*, and although till lately there was no caſe where this point was expreſsly conſidered,

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ſidered, yet it ſeems to have been taken as ſettled in many caſes, which have come before the court. One inſtance immediately occurs, in the caſe of *Robertſon* v. *Ewer*, which was cited in a former chapter. There, an embargo had been laid by Lord *Hood* on all ſhipping at *Barbadoes*; and it does not appear to have been doubted or queſtioned at the bar; that the inſurer was liable for any loſs which might have been ſuſtained by ſuch detention, provided the loſs had happened to any of the property ſpecifically inſured. It is true, that it is declared by the ordinances of *France*, "that if any ſhip be "ſtopped by our orders in any of the ports of our kingdom "*before the voyage be begun*, the inſured ſhall not, on account "of this detention, abandon or cede their effects to the in-"ſurers." A ſimilar regulation is to be found in *Bilboa*, by which it is ordained, "that if any ſhip or ſhips inſured, with "or without goods, ſhall be detained by his majeſty's order "in the ports of theſe kingdoms of *Spain*, *before the com-"mencement of the voyage ſhe is bound on*, it ſhall be judged "that no ceſſion can be made of them, but rather the inſur-"ance in ſuch caſe ought to be held null." If theſe ordinances, when they uſe the words, "commencement of the "voyage," mean commencement of the riſk inſured, they agree with the laws of *England* (*a*); becauſe the underwriter can never be anſwerable for any thing happening before that period: but when the riſk inſured is "at and from," if the ſhip be detained in the loading port, by order of the ſtate, before her departure for the voyage, but after the riſk commenced, the inſurer by our law is liable for the damage occaſioned by ſuch detention, as the words in the policy do in themſelves import no reſtriction to reſtraints and embargoes by foreign or hoſtile powers only.

Vide ante, p. 54.

2 Magens 176.

2 Magens 417.

[81 *a*]

Rotch v. Edie, very fully reported in 6 Term Rep. 413.

This queſtion came on lately for conſideration in the court of King's Bench; and was unanimouſly decided in favour of the aſſured after two arguments at the bar. But the learned judges deſired not to be conſidered as deciding upon the effect

(*a*) The French policies on the ſhip always attach only from the day the ſhip ſails unleſs the parties vary the general rule by a particular agreement. See the ordinances in 2 Magens 168, 169.

of

of an embargo laid on by our own ſovereign upon ſhips loading in this country. The queſtion came before the court upon a ſpecial caſe reſerved for its opinion, upon the trial of an action on a policy of inſurance on three ſhips, the *Adelaide*, *Adele*, and *Victor*, their ſtores, boats, and fiſhing materials, &c. upon two of them at and from *L'Orient*, and upon the third, at and from and after her arrival at *L'Orient*, and on all of them, "to all ports, ſeas, and places whatſoever, beyond and "on this ſide the Capes of *Good Hope* and *Horn*, on the "ſouthern whale and ſeal fiſhery and trade, and until the "ſhip's arrival back at *L'Orient*." The loſs is ſtated by the declaration to have happened by the ſhips and their ſtores and proviſions being, by authority of certain perſons exerciſing the powers of goverment in *France*, at *Port Louis* with reſpect to one, and at *L'Orient* with reſpect to the two others, arreſted and reſtrained from further proſecuting their voyages, and that they had thence hitherto been prevented and reſtrained therefrom under and by virtue of ſuch reſtraint. The caſe ſtated that the ſhip *Adelaide* ſailed from the port of *L'Orient* on the voyage inſured, but was obliged to put back by ſtreſs of weather into *Port Louis*; and whilſt ſhe lay there, and the ſhips *Adele* and *Victor* were preparing for the voyages in the policies mentioned, and before the neceſſary paſſports and clearances could be obtained, on the 5th *February* 1793, an embargo was laid on all veſſels in thoſe ports. That the *Adelaide* was brought back to *L'Orient*, and the periſhable ſtores of all the three ſhips ſold; and the ſaid three veſſels with the reſt of the ſtores now remain at *L'Orient*, under the embargo, which has continued ever ſince on all ſhips deſtined on long voyages; and none have ſince been permitted to ſail, except thoſe in government ſervice or upon ſhort coaſting voyages. The *Adele* and *Victor* had entered outwards upon the voyages inſured, when the embargo came; and that alone prevented the ſhips from ſailing. That notice of abandonment was given to the underwriters on 27th *Feb.* 1793, and a total loſs claimed; and the like notice and claim were repeated in *Auguſt* 1793 (*a*).

Lord

(*a*) Some other facts were ſtated; but as the effect of them was to ſhew that the plaintiff was either an alien enemy, or in partnerſhip with an alien enemy; and

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Lord *Kenyon*.—"I have looked into all the caſes which have been cited, and I have alſo conſidered the paſſages collected from foreign writers, and the moſt reſpectable of them ſeem to me to coincide with the conſtruction, which an *Engliſh* court of juſtice would put upon ſuch an inſtrument as the preſent. This plaintiff is under no diſability to ſue, and the defendant has entered into an engagement to indemnify him againſt arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever. By this peril, the ſhip has been detained near three years, and the voyage is defeated; but the plaintiff is to be told this is not a loſs within the policy. No common man reading the words of the policy could doubt upon the queſtion: and it is by artificial reaſoning only, collected by great reading from foreign authors, that his claim can be repelled. But in truth, when examined, the reſearch turns out to be all one way, and that is in favour of the plaintiff. *Roccus*, *Le Guidon*, *Green* v. *Young*, from Lord *Raymond*, are all one way: and although Lord *Holt* is ſaid not to have given an abſolute opinion, every thing that fell in judgment from that great man is deſerving of the higheſt attention. Lord *Mansfield* too has given an opinion upon the very point (2 *Burr.* 696, and ante, p. 78.); and when to this current of authorities we add the words of the policy itſelf, it is perfectly clear. Suppoſe war had been declared, and the ſhip had been detained in port as a prize, could there have been a doubt? and I can ſee no difference between the caſes (*a*)."

and as the facts did not ſupport the argument which was to be raiſed upon them, and did not form an ingredient in the judgment of the court, I forbear to ſtate them.

(*a*) In deciding the above caſe, the learned judges expreſsly declined giving an opinion upon the effect of an embargo laid on by the government of this country upon a ſhip inſured here. The caſe of Green v. Young, above ſtated, was indeed an embargo by the Britiſh government. The very point aroſe, and came on for argument upon a ſpecial caſe in a cauſe of Biſchoff v. Agar, in Eaſt. Term 1797. But it not being ſtated whether the abandonment was made in a reaſonable time, and the court inclining to think the abandonment ſhould be in the firſt inſtance, they ſent the caſe back for the jury to find that fact: and upon the ſecond trial the jury having found that the abandonment was not made in due time, gave a general verdict for the defendant; and the main queſtion reſpecting the embargo never was decided.

The

The other judges delivered their opinions *ſeriatim*, concurring unanimouſly with his Lordſhip; and there was judgment for the plaintiff.

By what has been ſaid it appears, that before the inſured can recover againſt the underwriter in caſes of detention, he muſt firſt abandon to the inſurers his right, and whatever claims he may have to the goods inſured. This point will be fully treated of in the chapter of abandonment. It will be ſufficient here to remark, that in moſt of the countries on the continent, the time for abandonment in ſuch caſes is fixed to a limited period after the event has happened. In *Bilboa* and *France* the ceſſion muſt be made within ſix months, if the loſs has happened in any part of *Europe*; and within a year, if in a more diſtant country. A ſimilar regulation as to time is eſtabliſhed by the ordinances of *Middleburgh* in *Zealand*. By the law of *England*, there is no poſitive rule on this ſubject, conſequently an inſured has a right to abandon immediately upon hearing of the detention. But it ſhould ſeem, that in order to prevent the underwriters from being harraſſed, the inſured ought to make his election, whether he will abandon or not, within a reaſonable time; and what that ſhall be, muſt in general depend upon the circumſtances of the caſe.

2 Magens 175, 416.

2 Magens 23.

See the caſe of Mitchell v. Edie, poſt, ch. 9. p. 174. where this point has been conſidered and ſettled; and ſee ante, p. 81 *b*. note (*a*), the caſe of Biſhoff v. Agar, where held that the abandonment muſt be in the firſt inſtance.

CHAPTER THE FIFTH.

Of Loſſes by the Barratry of the Maſter or Mariners.

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IT does not ſeem to have been any where preciſely aſcertained, from what ſource the term *barratry* has been derived.

Indeed the derivations of barratry have rather tended to confound, than to throw any light upon the ſubject: for its root has been ſo frequently altered, according to the caprice of the particular writer, that it is impoſſible to decide which is the true one. The *Engliſh*, however, moſt probably have taken it from the *French*, *barrateur*, which is to be traced to the *Italians*; but where the latter found this word is a thing by no means clear.

Cowp. 154. Whatever the derivation may be, the word ſeems to have been originally introduced into commercial affairs by the *Italians*, who were the firſt great traders of the modern world. In the *Italian* dictionary, the word *barratrare* means to cheat; and whatſoever is done by the maſter, amounting to a cheat, a fraud, a cozening, or a trick, is barratry in him. *Poſtlethwaite*, in his dictionary of trade and commerce, defines *barratry* thus: "barratry is committed when the maſter of the "ſhip, or the mariners, cheat the owners, or inſurers, whether "it be by running away with the ſhip, ſinking her, de-"ſerting her, or embezzling the cargo." In another place, the ſame author obſerves, "one ſpecies of barratry in a ma-"rine ſenſe is, when the maſter of a ſhip defrauds the "owners or inſurers, by carrying a ſhip a courſe different "from their orders." Theſe definitions are ſo very comprehenſive, that they ſeem to take in every caſe of barratry known to the law of *England*, as far as we can collect the principles from the ſeveral caſes that have been decided. From a review of thoſe caſes, and they are but few, it appears

1 vol. p. 214.

1 vol. 136.

2 Stra. 581.

that

that any act of the master, or of the mariners, which is of a criminal or fraudulent nature, or which is grosly negligent, tending to their own benefit, to the prejudice of the *owners of the ship*, without their consent or privity, is barratry. 2 Stra. 1173. Cowp. 143. 1 Term R. 323. 7 Term R. 505.

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen *in the act of barratry;* that is, it is immaterial, whether it take place *during* the *fraudulent* voyage, or *after* the ship has returned to the regular course; for the moment the ship is carried from its right track with an evil intent, barratry is committed. Cowp. 155.

But the loss, in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited by the policy, otherwise the underwriters are discharged. Thus, if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and *be there moored at anchor twenty-four hours in good safety*; the underwriters are not liable, if, after this, she should be seized for that act of smuggling. Lockyer v. Offley, 1 Term Rep. p. 252. Vide ante, c. 2. p. 31.

From the above descriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private interest, no barratry has been committed. I have said, that to constitute barratry, it must be without the knowledge or consent of the owners; because nothing can be so clear as this, that no man can complain of an act done, to which he himself is a party. But it is material to consider, in what sense the word owner is to be understood, in this definition. It has been argued, that if *A.* be the owner of a ship, and let it out to *B.* as freighter, who insures it for the voyage; and if the deviation be with the knowledge of *A.* though unknown to *B.* the insurer is discharged. But the court over-ruled that argument, and said, that in order to discharge the insurer from the loss by barratry, it must appear, that the act done was by the consent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the person insured. Cowper 154.

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These principles being advanced, it will now be sufficient to shew that they are supported and established by the cases which have been decided. But before they are quoted, it will be proper to observe, that by the positive regulations of *Middleburgh*, *Amsterdam*, *Hamburgh*, and other countries in *Europe*, the underwriters are universally held to be answerable for losses arising by the barratry of the master or mariners. By the ordinances of *Rotterdam*, the owners of ships are prohibited from making insurances against the barratry of the masters, whom they themselves shall appoint; but they may insure against their neglect, and also against the villainy of the sailors, and of such masters, as may happen to succeed to the command of the ship in foreign parts, without the knowledge of the owners, on account of the decease or absence of the master originally appointed. No such rule prevails in the law of *England*; but the insurer undertakes generally and by express words inserted in the policy, to indemnify the owner of the ship or cargo against all losses which he may happen to sustain by the barratry of the master or mariners, even though the master should have been appointed by himself: a circumstance which is rather singular, for the insurer to undertake for the conduct of a man whom he can neither appoint nor dismiss.

2 Magens 73. 130, 215.

2 Magens 89.

Knight v. Cambridge, 2 Ld. Raym. 1349. 1 Stra. 581.

In an action upon the case on a policy of insurance, on the ship *Riga Merchant*, "at and from *Port Mahon* to *London*, against the barratry of the master (among other "things), and all other damages, dangers, and misfortunes "which should happen to the prejudice and damage of the "said ship," the breach assigned in the declaration was the loss of the ship "*by the fraud and negligence*" of the master. The plaintiff had judgment in the court of Common Pleas. The defendant brought a writ of error, and it was contended by his counsel, that the words, "*fraud and negligence*," used in the declaration, were more general than the word *barratry*; and that the breach should have been express, that the ship was lost by the barratry of the master: that if the word *barratry* do import fraud, yet it does not import neglect;

and the fact here alledged is, that the ſhip was loſt by the fraud and negligence of the maſter. CHAP. V.

But the court were unanimouſly of opinion, that there was no occaſion to aver the fact in the very words of the policy; but that if the fact alledged came within the meaning of the words in the policy, it would be ſufficient. Barratry imports fraud; and he that commits a fraud, may properly be ſaid to be guilty of a neglect, *viz.* of his duty. Barratry of a maſter is not to be confined to the maſter's running away with the ſhip; but it extends to any fraud of the maſter. The end of inſuring is to be ſafe in all events; and, it would be very prejudicial if we were to make loop-holes to get out of theſe policies. The judgment was affirmed. [86]

In another caſe, the ſhip the *Gothick Lyon* being advertiſed to go to *Marſeilles*, goods were ſhipped on board her on behalf of the plaintiff; and a bill of lading was ſigned by the maſter, whereby he undertook to go ſtraight to *Marſeilles*, and the defendent underwrote a policy from *Falmouth* (where the goods were taken in) to *Marſeilles*. Before the ſhip departed from the port of *London*, another advertiſement was publiſhed for goods to *Genoa*, *Leghorn*, and *Naples*; and the plaintiff's agent was told, that it was intended to go to thoſe ports firſt, and then come back to *Marſeilles*; but he inſiſted that his bargain was to go directly to *Marſeilles*; and he would not conſent to let her paſs by *Marſeilles*, or alter his inſurance. Stamma v. Brown, 2 Stra. 1173.

The ſhip, however, did paſs by *Marſeilles*; and after delivering her cargo at the other ports, ſet out on her return for *Marſeilles* with the plaintiff's goods; but in a voyage thither, was blown up in an engagement with a *Spaniſh* ſhip. In an action upon the policy, the breach aſſigned was a loſs by the barratry of the maſter.

Lord Chief Juſtice *Lee* told the jury, that this voyage, being againſt the expreſs agreement to go firſt to *Marſeilles*, ſeemed

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ſeemed to be more than a common deviation, as it was a formed deſign to deceive the contractor. He compared it to the caſe of ſailing out of port without paying the duties, whereby the ſhip was ſubjected to forfeiture, and which has been held to be barratry.

The jury ſtaid out ſome time, and upon their return, aſked the Chief Juſtice, "Whether, if the maſter were to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places firſt for the benefit of his owners, that would be barratry?" and the Chief Juſtice having anſwered, "No," they found for the defendant.

[87] A new trial being moved for, the caſe was argued; and all the judges of the King's Bench were of opinion, that the verdict was right: for the maſter has acted conſiſtent with his duty to his owners; and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refuſed to ſhip them, or have altered the inſurance. The court alſo held, that to conſtitute barratry, there muſt be ſomething of a criminal nature, as well as a breach of contract; and, that as the breach was aſſigned upon the barratry only, it was not ſupported by the evidence. So the defendant had judgment.

Elton v. Brogden, 2 Stra. 1264.

In Sir *John Strange*'s Reports we find another caſe upon the ſubject of barratry. The ſhip *Mediterranean* went to ſea in the merchant's ſervice, having alſo a letter of marque; and was inſured by the defendant, being bound from *Briſtol* to *Newfoundland*. In her voyage ſhe took a prize, returned with it to *Briſtol*, and received back a proportionable part of the premium. Another policy was then made, and the ſhip ſet out, the captain having firſt received expreſs orders from the owners that if he took another prize, he ſhould put ſome hands on board ſuch prize, and ſend her to *Briſtol*; but that the ſhip in queſtion ſhould proceed with the merchant's goods. Another prize was taken in the due courſe of the voyage; and the captain gave orders to ſome of the crew to carry the prize to *Briſtol*, and deſigned to go on to *Newfoundland*; but

the crew oppoſed him, and inſiſted that he ſhould go back, though he acquainted them with his orders: upon which he was forced to ſubmit, and, on his return, his own ſhip was captured, but the prize got in ſafe.

In an action againſt the inſurers, it was inſiſted, that this was ſuch a deviation as diſcharged them. But Lord Chief Juſtice *Lee* and the jury held, that this deviation was excuſed by the force upon the maſter, which he could not reſiſt, and therefore fell within the plea of neceſſity, which had always been allowed. The plaintiff's counſel thought it was barratry; but the Chief Juſtice was of opinion, that it did not amount to that, as the ſhip was not run away with, in order to defraud the owners. But as this was a caſe not of wilful deviation, but of a deviation through neceſſity; the inſurers were held to be anſwerable, and the plaintiff had a verdict for the ſum inſured.

Theſe are all the common law caſes, which are to be found on the ſubject of barratry, during a long ſeries of years, *viz.* from the firſt origin of inſurances, till the year 1774, when a caſe aroſe, in which all the doctrine on this head was fully conſidered. [88]

It was an action on a policy of inſurance upon goods on board the *Thomas* and *Matthew* from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, *&c.* The loſs was aſſigned different ways in the declaration: Firſt, by ſtorms and perils of the ſea, in conſequence of which, the ſhip was obliged to go to *Dartmouth* to be repaired; and, that afterwards a further loſs happened by ſtorms, *&c.* Secondly, that it happened by ſtorms and perils of the ſeas in the voyage generally; and Thirdly, by the *barratry* of the maſter. Vallejo and another v. Wheeler, Cowp R. 143.

The cauſe was tried before Mr. Juſtice *Aſhhurſt* at *Guildhall*, at the ſittings after *Eaſter* term 1774, by a ſpecial jury. On the trial it was proved, that this ſhip was put up as a general ſhip from *London* to *Seville*; and was let to freight to

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one *Darwin*, to whom ſhe was chartered by *Brown* the captain: that it is the courſe of veſſels going on this voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions: that this ſhip having taken her cargo on board, ſailed from *London* to the *Downs*: that while ſhe lay there, all the other ſhips bound to the weſtward bore away; but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was *out of the courſe of the voyage*: that the captain went there for his own convenience, to take in brandy and wine on his *own account*; after which he intended to proceed to *Cornwall*: that the night after the ſhip quitted *Guernſey* ſhe ſprung a leak, which obliged her to put into *Dartmouth*. When ſhe was refitted, ſhe ſet ſail again and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop to take in proviſions; but in her way ſhe received further damage, and on her arrival there, was totally incapable of proceeding on the voyage, and the goods were much damaged. It was attempted on the part of the defendant to prove, that one *Willes* was the owner of the ſhip: that the voyage to *Guernſey* was on his account, and that the goods taken on board there were his property: but this evi-

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dence went little further than information and belief, except that it was proved, that when the ſhip arrived at *Helford*, the wine was delivered to him in his cellar. The learned judge directed the jury, that if the going to *Guernſey* was *without the knowledge of Darwin*, it was barratry, and they ought to find for the plaintiff; but if done with his knowlege, then it was not barratry: that if they ſhould be of opinion, that it was without the knowledge of *Darwin*, he deſired them to ſay, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and ſaid, they thought the going to *Guernſey* was without the knowledge of *Darwin*, whom they looked upon to be the true owner; but they were of opinion, it was with the knowledge of *Willes*.

A motion was afterwards made for a new trial; and the caſe, being a queſtion of great conſequence to the mercantile world, was twice argued at the bar; after which the

judges

judges were unanimously of opinion, that the plaintiff was entitled to recover, but they delivered the reasons of their judgment *seriatim*.

Lord *Mansfield*.—" The ground of the motion for a new trial in this case is, that under the circumstances, as they were given in evidence to the jury, the carrying the ship to *Guernsey*, was merely a *deviation*, but not *barratry*. Much more stress was laid at the trial, than in either of the arguments, upon this fact; namely, that the deviation being with the knowledge of *Willes*, the owner (though not owner *pro hâc vice*) of the ship, it could never be barratry; and therefore the jury were pressed to say, whether it was with the consent of *Willes* or not; and they said, " It was." To be sure nothing is so clear, as that if the owner of a ship insure, and bring an action on the policy, he can never set up as a crime a thing done by his own direction or consent. It was therefore a material fact to proceed upon, if *Willes* had had any thing to do in the case; but he had not. It appeared to me, that the nature of barratry had not been judiciously considered, or defined in *England* with accuracy. In all mercantile transactions, the great object should be certainty; and therefore it is of more consequence that the rule should be certain, than whether the rule is established one way or the other; because speculators in trade then know upon what ground to proceed." His lordship then stated the three cases above quoted from *Strange*; and after giving a definition of the word barratry, he proceeded thus: " In this case, the underwriter has insured against all barratry of the master; and we are not now in a case where the owner or freighter is privy to it; if we were, it is evident, that no man can complain of an act, to which he is himself a party. In this case, all relative to *Willes* may be laid out of it: he is originally the owner; but not the insurer here. *Darwin* was the freighter of the ship, and the goods that were on board were his: if any fraud be committed on the owner, it is committed on *Darwin*. The question then is, What is the ground of complaint against the master? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* trusts he will

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will set out immediately, instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville:* that is a cheat and a fraud on *Darwin*, who thought he would set out directly; and whether the loss happened in the act of barratry, that is *during* the fraudulent voyage, or *after*, is immaterial, because the voyage is equally altered, even though there is no other iniquitous intent. But in the present case, there is a great deal of reason to say, that the loss sustained was in consequence of the alteration of the voyage. The moment the ship was carried from its right course, it was barratry; and here the loss happened immediately upon the alteration. Suppose the ship had been lost *afterwards*, what would have been the case of the insured if he were not secured against the barratry of the master? He would have lost his insurance by the fraud of the master; for it was clearly a deviation, and the insured cannot come upon the underwriters for a loss, in consequence of a deviation. Therefore, I am clearly of opinion, that this smuggling voyage was barratry in the master."

Mr. Justice *Aston*.—" I wonder that there should remain a doubt at this day, what is meant by barratry in the master. In different ordinances different terms are used; but they all have the same meaning. In one of the ordinances of *Stockholm*, it is called " knavery of the master or mariners;" and the facts stated here, clearly fall within that description. Where it is a deviation with the consent of the *owner of the vessel*, and the master is not acting for his own private interest; in such case it is nothing but a deviation with the consent of the owner, and the underwriter is excused. In this case, the hull of the ship belonged to *Willes*; but he had nothing to do with it, having chartered it to *Darwin:* the jury therefore did right in considering *Darwin* the owner *pro hâc vice*. Having considered him in that light, the conduct of the master was clearly barratry; for he was acting for his own benefit, without intending any good to his owner, and without his consent and privity. Nobody knows when the first commencement of the injury happened; but most probably, on the return of the ship to *Dartmouth* from *Guernsey*,

Guernſey, where he had been for the purpoſe of ſmuggling. Therefore, I am clearly of opinion, that this change of the voyage for an iniquitous purpoſe, was barratry; which is not confined to the running away with the ſhip, but comprehends every ſpecies of fraud, knavery, or criminal conduct in the maſter, by which the owners or freighters are injured."

Mr. Juſtice *Willes*.—"The only doubt I had in this caſe was, at what time the loſs happened: and I think it may reaſonably be ſaid to have happened in conſequence of the ſmuggling voyage: for if the ſhip had proceeded on her firſt intended courſe, ſhe would have eſcaped the ſtorm. Though this was a deviation, yet it is a fair and juſt rebutter to ſay, that it was barratry in the maſter, which is a peril inſured againſt by the policy."

Mr. Juſtice *Aſhhurſt* continued of the ſame opinion, which he held at the trial; and the rule for a new trial was diſcharged by the unanimous opinion of the whole court.

In another caſe, which has already been twice cited for another purpoſe, Mr. Juſtice *Buller*, who tried that cauſe, ſeemed to think, that the breach of an embargo was an act of barratry in the maſter. Robertſon v. Ewer. Vide the laſt chapter.

In a ſubſequent caſe, which was an action on a policy on goods on board the *Live Oak*, whereof *Joſeph Rati* was maſter, at and from *Jamaica* to *New Orleans*, it appeared, that the ſhip was put up as a general ſhip at *Jamaica* in 1783; that ſhe ſailed on the voyage inſured in *May* 1783, and arrived in *June* following at the mouth of the river *Miſſiſſippi*, which leads up to *New Orleans* in *Spaniſh America*, at the diſtance of about 35 leagues. When the captain had got thus far he dropped anchor, and went in his boat up the river to *New Orleans*, and on his return, without carrying the ſhip to her port of deſtination, ſtood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reaſonable evidence Roſs v. Hunter, 4 Term R. 33. See poſt, p. 94. for another point.

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evidence for ſuppoſing he intended to have diſpoſed of at *New Orleans*; but finding it difficult to do ſo, on account of a prohibition to import them into the *Spaniſh* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the maſter; and the whole court of King's Bench, upon a motion for a new trial, were of opinion, that the facts ſtated amounted clearly to the crime of barratry.

Moſs v. Byrom, 6 Term R. 379. See poſt, p. 299.

So alſo it has been held by the Court of King's Bench, that if the captain of a ſhip, contrary to the inſtructions of his owner, cruize for and take a prize, and the veſſel is afterwards loſt in conſequence of it, he is guilty of barratry even though he libel his prize in the Court of Admiralty in the name of himſelf and his owner; and though the owner had procured a letter of marque, ſolely with a view to encourage ſeamen to enter, and without any intention of uſing it for the purpoſe of cruizing; for whatever is done by the captain to defeat or delay the performance of the voyage, is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his duty to them, it is barratry.

Phyn v. The Royal Exch. Aſſur. Comp. 7 Term R. 505.

Notwithſtanding the above uniformity of deciſions to ſhew that barratry implies fraudulent conduct, it has been contended, ſince the laſt edition of this book was publiſhed, that if a veſſel deviated from the voyage inſured, through the ignorance of the captain, it amounted to barratry, though the jury had expreſsly found that there was no fraud. But the Court of King's Bench, after conſiderable argument, were unanimouſly of opinion, that there muſt be fraud to conſtitute barratry, and that the jury, by negativing fraud, had in truth, by that finding, negatived barratry.

In the caſe of *Vallejo* v. *Wheeler*, it was ſettled, that the freighter of the ſhip is to be conſidered as the owner of it for the particular voyage: and it ſeems alſo clearly ſettled by the ſame caſe, that if an act be committed with the conſent of the

the owners of the ſhip, that cannot be barratry. It was, however, in a later caſe, inſiſted upon at the bar, that an act of the captain, without the conſent of the owners of the goods, who were the inſured, *though with the conſent of the owners of the ſhip*, was barratry, ſo as to charge the underwriters. But this argument was over-ruled by the court; and could not have been admitted without overturning all former deciſions upon the ſubject. Barratry implies ſomething contrary to the duty of maſter, and mariners, *in the relation in which they ſtand to the owners of the ſhip*; and although they may make themſelves liable to the owners of the goods for miſconduct, yet not for *barratry*, which can be committed againſt the owners of the ſhip, and them only.

Nutt and others, aſſignees of Hague v. Bourdieu, 1 Term Rep. 323.

The caſe, in which this point was ſettled, was an action on a policy of inſurance, made by *Hague* before he became a bankrupt, *on goods* laden in the ſhip *Rachette* (otherwiſe the *Bellona*) for a voyage from *London* to *Rochelle*, ſubſcribed by the defendant for 120 *l.* at 1 *l.* 10 *s. per cent.* premium. The cauſe was tried at *Guildhall* before Mr. Juſtice *Buller*, when a verdict was found for the plaintiff, ſubject to the opinion of the court, upon the following caſe: That the bankrupt ſhipped on board the veſſel in queſtion goods to the amount of 1,800 *l.* for *Rochelle*. That the captain, *by the inſtigation and direction of Meſſrs. Le Grands, the owners of the ſhip, went with the ſhip and cargo to Bourdeaux, inſtead of Rochelle*, where the cargo was ſold by the agent of *Le Grands*. That a petition was preſented by the plaintiffs to the lieutenant-general of the Admiralty of *Guienne*, ſtating the whole of the tranſaction between the bankrupt and the owners and captain; that in order to procure a landing at *Bourdeaux*, their original deſtination being to *Rochelle*, falſe bills of loading were made out by the captain, at the inſtigation of *Le Grand*: the petition concluded with a prayer for relief. In conſequence of this petition, a decree was paſſed, declaring *René Gutiné* (captain) *guilty of the crime of barratry of the maſter*, for having ſigned falſe bills of lading, *&c.* for reparation whereof, it ſentenced him to perpetual

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perpetual ſervice in the gallies. It alſo declared *Dominique Le Grand* guilty and convicted *of having been an inſtigator and accomplice of the ſaid barratry* of the maſter, and adjudged him to five years ſervitude in the gallies: and alſo decreed, that the ſaid *René Guiné* and *Le Grand* ſhould pay to the plaintiffs the amount of their loſs, and all charges and coſts. The queſtion on this caſe is, Whether the plaintiffs were entitled to recover againſt the inſurers? After the firſt argument,

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Lord *Mansfield* ſaid, "that with regard to the ſentence which had been paſſed abroad, and which had declared the maſter and owner to have been guilty of barratry, it was entirely out of the queſtion. That though it was a moſt righteous judgment, yet that it was no part of the conſideration of the court there, what was meant by barratry in an *Engliſh* policy. The queſtion was left entirely open. That their idea of barratry was manifeſtly different from the conſtruction put upon that word in our own courts, for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry, which had ever been laid down in an *Engliſh* court of juſtice."

A few days afterwards the court declared, that they had not the ſmalleſt doubt as to the preſent queſtion, and therefore thought it very unneceſſary to hear a ſecond argument.

Lord *Mansfield* delivered the opinion of the court.

All queſtions upon mercantile tranſactions, but more particularly upon policies of inſurance, are extremely important, and ought to be ſettled. The general queſtion here is on the conſtruction of the word *barratry* in a policy of inſurance. It is ſomewhat extraordinary that it ſhould have crept into inſurances, and ſtill more, that it ſhould have continued in them ſo long; for the underwriter inſures the conduct of the captain, whom he does not appoint, and cannot diſmiſs, to the owner, who can do either. The point to be conſidered is,

is, Whether barratry, in the ſenſe in which it is uſed in our policies of inſurance, can be committed againſt any but the owners of the ſhip? It is clear, beyond contradiction, that it cannot; for barratry is ſomething contrary to the duty of the *maſter and mariners*, the very terms of which imply, that it muſt be in the relation in which they ſtand to the *owners of the ſhip*. The words uſed are *maſter* and *mariners*, which are very particular. *An owner cannot commit barratry.* He [94] may make himſelf liable by his *fraudulent conduct* to the owner of the goods, but not *as for barratry*. And, beſides, barratry cannot be committed againſt the owner, *with his conſent:* for though the owner may become liable for a civil loſs by the miſbehaviour of the captain, if he conſents, yet that is not *barratry*. Barratry muſt partake of ſomething criminal, and muſt be committed *againſt the owner* by the *maſter* or *mariners*. In the caſe of *Vallejo* and *Wheeler*, the court took it for granted, that barratry could only be committed againſt the owner of the ſhip. The point is too clear to require any further diſcuſſion.

The *poſtea* was delivered to the defendant.

It is clear that if the owner be alſo the maſter of the ſhip, any act, which in another maſter would be conſtrued barratry, cannot be ſo in him; becauſe ſuch doctrine would militate againſt one of the rules laid down in a former part of this chapter; namely, that no man ſhall be allowed to derive a benefit from his own crime, which he would do, were he to recover againſt the inſurers for a loſs, occaſioned by his own act. But where the perſon, who acts as maſter of the ſhip, is proved to have carried her out of her courſe for fraudulent purpoſes of his own, that is *primâ facie* evidence of barratry, ſo as to entitle the aſſured to recover againſt the underwriter, without requiring him to prove *negatively* that ſuch captain was not the owner, or ſhewing who really was ſo. The fact of his being owner muſt be eſtabliſhed by the underwriter, in diſcharge of whom it is to operate.

Roſs v. Hunter, 4 Term R. 33. See ante, p. 91.

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This rule reſpecting the ſame perſon being both owner and maſter has been extended in the Court of Chancery to a caſe, where ſuch an owner and maſter, after mortgaging his ſhip, had committed barratry; and when the mortgagee brought an action at law againſt the inſurer to recover damages for the loſs which he had ſuſtained by this act of barratry, the court, ſtill conſidering the mortgagor as the owner, granted an injunction.

Lewin v. Suaſſo, Chancery, 16 Geo. II. Poſtlethw. Dictionary, 1 vol. 147.

The facts of that caſe were theſe. The plaintiff in equity, having been ſued at law upon a policy of inſurance againſt the barratry of the maſter, which was alſo the loſs aſſigned in the declaration, brought his bill in Chancery to be relieved, and for an injunction. The voyage inſured was from *London* to *Marſeilles*, and from thence to ſome port in *Holland*. The maſter ſailed with the ſhip to *Marſeilles*, and then, inſtead of purſuing his voyage, ſailed to the *Weſt Indies*, where he ſold his ſhip, and died inſolvent. The plaintiff by his bill ſuggeſted, that *Matthews*, the maſter, was alſo the owner of the ſhip: that he had, before the voyage, entered into a
[95] bottomry bond to the defendant for 200 *l.* and afterwards, by a bill of ſale, had aſſigned over his intereſt in the ſhip to the defendant, as a ſecurity for the 200 *l.*; that *Matthews* was nevertheleſs, in equity, to be conſidered as owner of the ſhip, though in law the ownerſhip and property would be looked upon to be in the defendant; and that the owner of a ſhip could not, either in law or equity, be guilty of a barratry concerning the ſhip; and therefore he prayed an injunction, and that the policy might be delivered up. The matters of fact being confeſſed by the anſwer, an injunction was moved for on the principle, that a mortgagor is to be conſidered in equity as the owner of the thing mortgaged; and that *Matthews*, the maſter, being owner, could not be guilty of barratry.

Lord *Hardwicke*.—"Barratry is an act of wrong done by the maſter againſt the ſhip and goods; and this being the caſe of a ſhip, the queſtion will be, Who is to be conſidered as

as the owner? Several cases might be put, where barratry may be assigned as the breach of an insurance; and barratry or not, is a question properly determinable at law: but in this case it is not so, for courts of law will not consider a mortgagor as having any right or interest in the thing mortgaged; and a man may frequently come into equity for relief in respect of a part only of his case. It might, indeed, be considered at law, whether what the master has done, whether he be owner or not, did not amount to a breach of contract as master, and so to a barratry: it may likewise be so considered in this court. But at law a defendant cannot read part of a plaintiff's answer to a bill filed against him here: the whole answer must be read, which has often been a reason for this court to interpose by injunction upon a plaint at law; and considering the mixed nature of this case, I think an injunction ought to be granted."

Even if the parties insert in the policy that the insurance shall be upon the ship *in any lawful trade*, if the captain commit barratry by smuggling, the underwriters are answerable. For otherwise the word *barratry* should be struck out of the policy; and most clearly the stipulation in the policy respecting the employment of the ship in a lawful trade, must mean, as was said by Lord *Kenyon* in delivering the unanimous opinion of the Court, *the trade on which she is said by the owners.*

Havelock v. Hancil upon Demurrer, 3 Term R. 277.

Hitherto we have considered barratry only, as it affects the rights of the insurer and insured, which is certainly the material point of view in our present enquiry: but, before we come to the conclusion of this chapter, it will be proper to take notice of those positive regulations, which exist in this and other countries, for the punishment of those who are guilty of some of the more heinous acts of barratry.

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By the ordinances of *Middleburg*, *Rotterdam*, and *Hamburgh*, if any act of barratry be committed by the master, various degrees of punishment, sometimes amounting even

2 Magens 79. 112. 215.

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to death, are inflicted upon him, proportioned to the enormity of his guilt.

We do not find that any puniſhment was expreſsly provided, by the law of *England*, for offences of this nature, till the reign of Queen *Anne*, at which time, as may be collected from the preamble of the ſtatute, the wilful caſting away, burning or deſtroying of ſhips by the maſter or mariners, was become very frequent.

1 Anne, ſtat. 2. c 9. ſ. 4.

To prevent theſe evils that ſtatute ordains, "that if any "captain, maſter, mariner, or other officer belonging to any "ſhip, ſhall wilfully caſt away, burn, or otherwiſe deſtroy "the ſhip unto which he belongeth, or procure the ſame to "be done to the prejudice of the owner or owners thereof, "or of any merchant or merchants that ſhall load goods "thereon, he ſhall ſuffer death as a felon."

4 Geo. I. c. 12. ſ. 3.

Upon trial this act was found not to be ſufficiently extenſive; and therefore, by a ſubſequent ſtatute, it was declared, "that if any owner of, or captain, maſter, mariner, or "other officer belonging to any ſhip, ſhall wilfully caſt "away, burn, or otherwiſe deſtroy the ſhip of which he is "owner, or unto which he belongeth, or in any manner "direct or procure the ſame to be done, to the prejudice "of any perſon or perſons that ſhall underwrite any po-"licy or policies of inſurance thereon, or of any mer-"chant or merchants that ſhall load goods thereon, he ſhall "ſuffer death."

11 Geo. I c. 29. ſ. 6.

By a ſubſequent ſtatute it was afterwards enacted, "that "if any owner of, or captain, maſter, officer, or mariner "belonging to any ſhip or veſſel, ſhall wilfully caſt away, "burn, or otherwiſe deſtroy the ſhip or veſſel of which he "is owner, or to which he belongeth; or in any wiſe di-"rect or procure the ſame to be done, with intent or deſign "to prejudice any perſon or perſons that hath underwrote, "or ſhall underwrite any policy or policies of inſurance "thereon,

" thereon, or of any merchant or merchants that ſhall load " goods thereon, or of any owner or owners of ſuch ſhip " or veſſel, the perſon or perſons offending therein, being " thereof lawfully convicted, ſhall be deemed and adjudged a " felon or felons, and ſhall ſuffer, as in caſes of felony, with- " out benefit of clergy."

The following ſection directs, that if the offence be committed within the body of a county, the ſame ſhall be tried as all felonies are in the common law courts: but if upon the high ſeas, then to be tried agreeably to the directions of the 28 H. 8. c. 15. 7th Section.

Theſe are the only poſitive regulations, known to the law of *England*, for the puniſhment of thoſe who wilfully deſtroy ſhips to the prejudice of ſuch perſons as are intereſted in their preſervation.

CHAPTER THE SIXTH.

Of Partial Loſſes, and of Adjuſtment.

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HAVING, in the preceding chapters, treated fully of the different kinds of loſſes, for which the underwriters are anſwerable, the ſubject naturally leads one to conſider, when loſſes ſhall be ſaid to be total, and when partial or *average*, as they have been moſt commonly denominated. When we ſpeak of a total loſs, we do not always mean to ſignify, that the property inſured is irrecoverably loſt or gone: but that, by ſome of the perils mentioned in the policy, it is in ſuch a condition, as to be of little uſe or value to the inſured, and ſo much injured, as to juſtify him in abandoning to the inſurer, and in calling upon him to pay the whole amount of his inſurance, as if a total loſs had actually happened. But the idea of a total loſs, in this ſenſe of the word, is ſo intimately blended and interwoven with the doctrine of abandonment, that it will add much to clearneſs and preciſion, to refer what may be ſaid on this ſubject, till we come to the chapter on abandonment. In this place it will be ſufficient to remark, that in caſe of a total loſs, properly ſo called, the prime coſt of the property inſured, or the value mentioned in the policy, muſt be paid by the underwriter; at leaſt, as far as his proportion of the inſurance extends. This is evident from the nature of the contract; for the inſurer engages, as far as to the amount of the prime coſt, or value in the policy, that the thing inſured ſhall come ſafe: he has nothing to do with the market; he has no concern in any profit or loſs which may ariſe to the merchant from the ſale of the goods. If they be totally loſt, he muſt pay the prime coſt, that is, the value of the thing he inſured, at the *outſet*; he has no concern in any ſubſequent value. So likewiſe, if part of the cargo, capable of a ſeveral and diſtinct valuation at the outſet, be totally loſt; as if there be one hundred hogſheads of ſugar, and ten happen to be loſt, the inſurer

1 Burr. 1170.

must pay the prime coſt of thoſe ten hogſheads, without any regard to the price, for which the other ninety may be ſold. Thus much at preſent for total loſſes. CHAP. VI.

The ſubject of this and the following chapter, ſeems to be of all others the moſt intricate and perplexing, in the whole law of inſurance; an intricacy, which ariſes from ſeveral cauſes. In the firſt place, the ſubject of average has very ſeldom fallen under the cognizance of courts of judicature in this country; conſequently there are very few adjudged caſes to be found. In this ſcarcity of ſettled principles, recourſe muſt be had to the writers of foreign nations, and to ſuch of our own as have written upon commerce in general: but the reſearch is by no means attended with ſatisfaction, much leſs with conviction. 3 Burr. 1555. Another ſource of perplexity upon this ſubject is, the irregularity and confuſion, which we meet with, in the preſent form of policies of inſurance. Ambiguities frequently ariſe in them, by uſing the ſame words in different ſenſes; and, in no inſtance, is this abſurdity more glaring than in the uſe of the word average. This word in *policies* has two ſignifications; for it means "*a contribution to a general loſs*;" and it alſo is uſed to ſignify "*a particular partial loſs.*" In commercial affairs, indeed, it has no leſs than four different meanings: and therefore it cannot be wondered at, if much confuſion of ideas has ariſen upon the ſubject. In order to prevent that, if poſſible, in the ſubſequent part of this work, I ſhall here endeavour to diſtinguiſh between the four different ſenſes of the word "average;" and wherever I ſhall have occaſion in future to ſpeak of a damage ariſing to goods or other property, not total, except when I am reciting the words of a policy, I ſhall take the liberty of calling it, as I have already done at the head of this chapter, a *partial*, not an *average* loſs.

When goods, or merchandizes carried by ſea, are thrown over-board in a ſtorm, for the purpoſe of lightening the ſhip; the owners of the ſhip and of the goods ſaved contribute for the relief of thoſe, whoſe goods are ejected, in ſuch a manner, that all who profited by the lightening of the ſhip, Lex Merc. red. 147.

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may bear a proportional loſs of the goods, thus thrown overboard for the common ſafety. This contribution is what is called general or groſs average; the full diſcuſſion of which will be the buſineſs of the next chapter.

Small or petty averages are the next ſpecies; and, as theſe never fall upon the underwriters, I ſhall here ſet down all that is neceſſary upon that ſubject. Petty average conſiſts in ſuch charges and diſburſements, as, according to occurrences, and the cuſtom of every place, the maſter neceſſarily furniſhes for the benefit of the ſhip and cargo, either at the place of loading or unloading, or on the voyage. Theſe charges are, lodemanage, which, as it appears by *Cowel*'s interpreter, means the hire of a pilot for conducting a veſſel from one place to another; towage, pilotage, light-money, beaconage, anchorage, bridge-toll, quarantine, river charges, ſignals, inſtructions, paſſage money by caſtles, expences for digging a ſhip out of the ice when frozen up, that it may be brought into a proper harbour; and at *London*, by cuſtom, the fee paid at *Dover* pier. Theſe ſeem to be all the articles which come under the denomination of petty or accuſtomed average, as well in this as in foreign countries.

Magens 72.

Cowel, 2 Mag. 180, 378.

For theſe charges, the inſurers are never anſwerable; but one third of the expences is borne by the ſhip, and two thirds by the cargo. But in order to diſcharge the inſurer, it muſt appear, that the diſburſements were uſual and cuſtomary in the voyage; for if they were incurred for any extraordinary purpoſe, or in order to relieve the ſhip and cargo from ſome impending danger, they ſhall then be reputed a general average, and conſequently be a charge on the inſurer. In lieu of theſe petty averages, it has become uſual at ſome places to pay 5 *per cent* calculated on the freight, and 5 *per cent.* more for primage to the captain.

Mag. 72.

5 Mag. 72.

Another ſpecies of average, in matters of commerce, is that which we are accuſtomed to meet with in bills of lading, "paying ſo much freight for the ſaid goods, with primage "and *average* accuſtomed." In this ſenſe it ſignifies a ſmall duty,

Jacob's Law Dict. title Average.

duty, which merchants, who ſend goods in the ſhips of other men, pay to the maſter, over and above the freight, for his care and attention to the goods ſo entruſted to him. This kind of average may alſo be laid out of the preſent enquiry, as it is too inſignificant a charge to fall upon the underwriter. CHAP. VI. [101]

Having thus diſpoſed of the different kinds of average, ſo as to prevent a confuſion of ideas, we ſhall now proceed to the main ſubject propoſed, namely, what ſhall be conſidered as a partial loſs? how ſuch a loſs ſhall be adjuſted, and in what proportion it ſhall be paid. I ſaid, at the beginning of this chapter, that theſe were queſtions of intricacy; and ſo moſt undoubtedly they formerly were: but much light has been thrown upon them by Lord *Mansfield*, in his elaborate and very learned argument in the caſe of *Lewis* v. *Rucker*; 2 Burr. 1167. and, as that caſe has been frequently recognized, and has ever ſince been looked up to, as the rule and ſtandard of deciſion upon ſimilar occaſions, I have drawn moſt of my ideas upon this ſubject from the reaſoning there made uſe of by his lordſhip in delivering the opinion of the court.

Partial loſs, *ex vi termini*, implies a damage, which the ſhip may have ſuſtained, in the courſe of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it alſo means the damage which goods may have received, without any fault of the maſter, by ſtorm, capture, ſtranding, or ſhipwreck, although the whole, or the greater part thereof may arrive in port. Theſe partial loſſes fall upon the owners of the property ſo damaged, who muſt be indemnified by the underwriter. For if the goods arrive, but 2 Burr. 1172. leſſened in value through damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it can only be effected by putting the merchant in the ſame condition in which he would have been, if the goods had arrived free from damage.

The underwriters of *London* expreſsly declare, as appears from a memorandum at the foot of the policy, that they will Vide the Appendix, No. 1.

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not anſwer for partial loſſes, not amounting to 3 *per cent.* This clauſe was introduced into *Engliſh* policies about the year 1749, having long before that time been generally uſed in almoſt all the trading countries in *Europe*; and it was intended to prevent the underwriters from being continually harraſſed by trifling demands. But at the ſame time, that they provide againſt trifling claims for partial loſſes, they undertake to indemnify againſt loſſes, however inconſiderable, that ariſe from a general average; becauſe that can never happen but in caſes of imminent danger, when it is for the common intereſt that ſuch expences ſhould be incurred.

[202]

2 Magens 73. It has been obſerved by a very ſenſible merchant, who has written upon inſurances, that almoſt all the ordinances ſeem deficient, in not fully explaining in what caſes, and in what manner, the damage ariſing from a partial loſs, ſhall be deemed to exceed 3 *per cent.* To illuſtrate his meaning, he ſtates this caſe. Suppoſe, ſays he, a merchant has ſhipped 101 cheſts of goods, of which, on arrival, three cheſts are, by the ſea, or by ſome accident, ſo ſpoiled, as to be worth nothing; if the damage be calculated as on the whole value of 101 cheſts, it will not exceed 3 *per cent.* and it is thought by moſt inſurers not to be recoverable, in ſuch a caſe, by the inſured: eſpecially if the inſurance be made, without expreſsly declaring, in the policy, the particular ſum inſured on each cheſt. The foundation of this opinion is, that it is conſidered as one entire inſurance, and not a diſtinct inſurance on each cheſt.

This is a point, which at firſt view may ſeem to fall within
2 Burr. 1170. a caſe laid down by Lord *Mansfield*. "If," ſaid his lordſhip, "the cargo be totally loſt, the underwriter muſt pay the value of the thing he inſured. So, if part of the cargo, capable of a ſeveral and diſtinct valuation at the outſet be *totally* loſt; as if there be 100 hogſheads of ſugar, and ten happen to be loſt, the inſurer muſt pay the prime coſt of thoſe ten hogſheads, without any regard to the price for which the other 90 may be ſold." So it has been ſuppoſed in the caſe put by *Magens*, the three cheſts of goods are as capable of a diſtinct

diſtinct and ſeveral valuation, as the three hogſheads of ſugar: and conſequently are to be paid for, as for a total loſs. But Lord *Mansfield* is putting a caſe merely to ſhew, that the market price is not at all to be conſidered in charging the inſurer; and his lordſhip certainly had not in his contemplation the caſe put by *Magens*.

As clearneſs and preciſion are neceſſary upon all ſubjects, and more eſpecially upon this, it will be proper to obſerve, that when we ſpeak of the underwriter being liable to pay, whether for total or partial loſſes, it muſt always be underſtood, that they are liable only in proportion to the ſums which they have underwritten. Thus, if a man underwrite 100 *l.* upon property valued at 500 *l.* and a total loſs happen, he ſhall be anſwerable for 100 *l.* and no more, that being the amount of his ſubſcription: if only a partial loſs, amounting to 60 *l.* or 70 *l. per cent.* upon the whole value; he ſhall pay 60 *l.* or 70 *l.* being his proportion of the loſs. [103]

When a total loſs happens, the inſured is entitled to recover againſt the underwriter, as ſoon as he has proved the value of the thing inſured: but when the value is inſerted in a policy, the inſurer, by allowing ſuch inſertion, has admitted the value to be as ſtated; and nothing remains but to prove, that the goods inſured were actually on board the ſhip. It is only in caſes of total loſs that any difference conſiſts between a valued, and an open policy: in the former caſe the value is aſcertained; in the latter, it muſt be proved. But where the loſs is partial, the value in the policy can be no guide to aſcertain the damage; which then neceſſarily becomes a ſubject of proof, as much as in the caſe of an open policy. 1 Magens 35. Vide ante, c. 1. p. 1.

When a partial loſs happens, the firſt enquiry which naturally ariſes is this; for what does the inſurer undertake to indemnify the owner, in caſe of a partial loſs? To anſwer this queſtion, regard muſt be had to the nature of the contract, between the underwriter and the merchant. What is the nature of the contract? That the goods ſhall come ſafe 2 Burr. 1172, 1173.

to

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to the port of delivery; or if they do not, that the inſurer will indemnify the owner to the amount of the value of the goods ſtated in the policy. Wherever then the property inſured is leſſened in value, by damage received at ſea, juſtice is done by putting the merchant in the ſame condition (relation being had to the prime coſt or value in the policy) which he would have been in, if the goods had arrived free from damage; that is, by paying him ſuch proportion of the prime coſt or value in the policy as correſponds with the proportion of the diminution in value occaſioned by the damage. The queſtion then is, how is the proportion of damage to be aſcertained? It certainly cannot be by any meaſure taken from the prime coſt: but it may be done in this way. Where an entire thing, as one hogſhead of ſugar, happens to be ſpoiled, if you can fix, whether it be a third, a fourth, or a fifth worſe, then the damage is aſcertained to a mathematical certainty. How is this to be found out? Not by any price at the port of diſcharge; but it muſt be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the ſame thing; for in either caſe it equally ſhews, whether the damaged goods are a third, a fourth, or a fifth worſe than if they had come ſound: conſequently, whether the injury ſuſtained be a third, fourth, or fifth of the value of the thing. And as the inſurer pays the whole prime coſt, if the thing be wholly loſt; ſo if it be only a third, fourth, or fifth worſe, he pays a third, fourth, or fifth, not of the value for which it ſold, but of the value ſtated in the policy. And when no valuation is ſtated in the policy, the invoice of the coſt, with the addition of all charges, and the premium of inſurance, ſhall be the foundation, upon which the loſs ſhall be computed.

2 Burr. 1170. [104]

1 Magens 37.

This rule of aſcertaining damage, occaſioned by a partial loſs, ſeems to be fraught with ſo much good ſenſe, to be ſo very comprehenſive, and ſo intelligible to every underſtanding, that it will now be only neceſſary to ſhew, that the decided caſes have been agreeable to that rule: firſt requeſting the reader to bear in mind, what has already been mentioned, namely,

namely, that the value, upon which the foregoing calculation refts, is the prime coft of the commodity, wholly independent of the rife or fall of the market, or the fchemes or fpeculation of the merchant. CHAP. VI.

In an action upon a policy of infurance to recover an average lofs upon goods, Mr. Juftice *Buller* obferved, that in fuch cafes, whether the goods arrived to a good or bad market was immaterial; for the true way of eftimating the lofs was to take them at the fair invoice price (*a*). Dick and another v. Allen, at Guildhall, after Mich. Term, 1785.

A rule having been obtained by the plaintiffs, who were the infured, for the defendant (the infurer) to fhew caufe, why a verdict, obtained by him, fhould not be fet afide, and a new trial had; Lewis and another v. Rucker, 2 Burr. 1167.

The court, after hearing the matter fully debated, took time to advife, and their unanimous opinion was delivered to the following effect: [105]

Lord *Mansfield*.—" This was an action brought upon a policy, by the plaintiffs, for Mr. *James Bourdieu*, upon the goods on board a fhip, called the *Vrow Martha*, at and from *St. Thomas's Iſland* to *Hamburgh*, from the loading at *St. Thomas's Iſland*, till the fhip fhould arrive, and land the goods at *Hamburgh*. The goods, which conſiſted of fugars, coffee, and indigo, were valued; the clayed fugars at 30 *l. per* hogfhead; the *Muſcovado* fugars at 20 *l. per* hogfhead; and the coffee and indigo were likewife refpectively valued. The fugars were warranted free from average (that is partial lofs) under 5 l. *per cent.*; and all other goods free from average under 3 *l. per cent.* unlefs general or the fhip be ftranded.

In the courfe of the voyage the fea water got in; and when the fhip arrived at *Hamburgh*, it appeared that every

(*a*) Neither does the underwriter infure againft any lofs that may arife from the difference of exchange. *Thellufſon* v. *Bewick*. Sittings after *Michaelmas*, 34 Geo. III. *Eſpinaſſe*, p. 77.

hogfhead

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hogſhead of ſugar was damaged. The damage the ſugars had ſuſtained, made it neceſſary to ſell them immediately; and they were accordingly ſold; but the difference between the price which they brought, on account of the damage, and that which they might then have been ſold for at *Hamburgh*, if they had been ſound, was as 20 *l.* 0 *s.* 8 *d. per* hogſhead is to 23 *l.* 7 *s.* 8 *d.* per hogſhead: (that is, if ſound, they would have been worth 23 *l.* 7 *s.* 8 *d.* per hogſhead; as damaged, they were only worth 20 *l.* 0 *s.* 8 *d. per* hogſhead).

The defendant paid money into court, by the following rule of eſtimating the damage: he paid the like proportion of the ſum, at which the ſugars were valued in the policy, as the price of the damaged ſugars bore to ſound ſugars at *Hamburgh*, the port of delivery. All this was admitted at the trial; though perhaps upon an accurate computation, there may be a miſtake of about 17 *s.* on the money paid in. But no advantage was attempted to be taken of this ſlip; it was admitted, that the money paid in was ſufficient, if the rule, by which the defendant eſtimated the loſs, was right: and the only queſtion was, by what meaſure or rule the damage, upon all the circumſtances of the caſe, ought to be eſtimated.

[106] To diſtinguiſh this caſe, under its particular circumſtances, out of any general rule, the plaintiff's counſel called Mr. *Samuel Chollett*, clerk to Mr. *Bourdieu*, who proved, that upon the 15th of *February*, the time of the inſurance, ſugars were worth at *London* and *Hamburgh*, 35 *l.* a hogſhead; that the propoſal of a congreſs to be holden, and the expectation of a peace, had, on a ſudden, ſunk the price of ſugars: that before the ſhip arrived at *Hamburgh*, and before he knew that the ſugars had received any damage, Mr. *Bourdieu* had ſent orders, that the ſugars ſhould be houſed at *Hamburgh*, and kept till the price ſhould riſe above 30 *l.* a hogſhead: that he had many hundred hogſheads of ſugar lying at *Amſterdam*, to which place he had ſent the like orders; that the congreſs not taking place, *in fact* ſugars roſe 25 *per cent.*: that what he ſold of the ſugars, which he had at *Amſterdam*, brought 30 *l. per* hogſhead, and upwards:

that

that he might have ſold theſe ſugars at the ſame price, if they had been kept, according to his orders; and the only reaſon for which they were not kept was, becauſe they were rendered periſhable from the ſea water, which had got in. Therefore, ſaid they, the neceſſity of an immediate ſale, and the conſequence thereof, ought to be computed into the damage.

The ſpecial jury (amongſt whom there were many ſenſible merchants) found the defendant's rule of eſtimation to be right, and gave their verdict for him. They underſtood the queſtion very well, and knew more of the ſubject of it, than any body elſe preſent; and they formed their judgment from their own notions and experience, without much aſſiſtance from any thing that paſſed.

The counſel for the plaintiff, in the outſet, chiefly reſted upon the particular circumſtances of this caſe. The defendant offered to call witneſſes to prove the general uſage of eſtimating the quantity of damage, when goods are injured.

I was at firſt ſtruck with the argument, that the immediate neceſſity of ſelling in this caſe might be taken into conſideration, as an exception to the general rule; and propoſed that the cauſe might be left to the jury upon that point. But Mr. *Winn* for the defendant argued, that the neceſſity of ſelling, and the conſequence thereof ought not to be regarded: and what he ſaid, had ſo much weight, that it very much changed my way of thinking. [107]

There was nothing to ſum up; but the jury aſked, Whether I would give them any directions? I ſaid, I left it to them, "Whether the difference between the ſound and the "damaged ſugars, at the port of delivery, ought to be the "rule; or, whether the neceſſity of an immediate ſale, cer-"tainly occaſioned by the damage, and the loſs thereby, ſhould "be taken into conſideration." I told them, though it had ſtruck me at firſt, this might be an exception; yet what the counſel for the defendant ſaid to the contrary, ſeemed to have great

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great weight. The verdict was for the defendant; and a new trial was moved for.

No fact is now disputed; the only question is, whether the jury have estimated the damage by a proper measure. To make this matter more intelligible, I will first state the rule, by which the defendant and the jury have gone, and then I will examine whether the plaintiff has shewn a better.

The defendant takes the proportion of the difference between found and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price in money, which either the found or the damaged goods bore in the port of delivery. He says, the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy to be 30 *l.*; the goods are damaged, but sell for 40 *l.*: if they had been found, they would have sold for 50 *l.* The difference then between the found and damaged is a fifth; consequently the insurer must pay a fifth of the prime cost, or value in the policy, that is 6 *l.*: *e converso*, if they come to a losing market, and sell for 10 *l.* being damaged, but would have sold for 20 *l.* if found, the difference is one half: the insurer must pay half the prime cost, or value in the policy, that is 15 *l.*

To this rule, two objections have been made. First, that it is going by a different measure in the case of a partial, from that which governs in case of a total loss; for upon a total loss, the prime cost, or value in the policy, must be paid.

[108]

The answer to which objection is, that the distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage, to the amount of the value in the policy; and therefore, if the thing be totally lost, the insurer must pay the whole value which he insured at the outset. But where a part of the commodity is spoiled, no measure can be taken from the prime cost to ascertain the quantity of the damage sustained. The only way

is

is to fix whether the thing be a third or fourth worse than the ſound commodity; and then you pay a third or fourth of the prime coſt, or value of the goods ſo damaged (*a*). CHAP. VI.

The next objection, with which this caſe has been entangled, is taken from the circumſtance of the policy in queſtion being a valued policy.

I am a little at a loſs to apply the arguments drawn from thence. It is ſaid, "that a valued is a wager policy, like "*intereſt or no intereſt*; and if ſo, there can be no partial "loſs, and the inſured can only recover as for a total loſs, "abandoning what is ſaved, becauſe the value ſpecified is "fictitious."

A valued policy is not to be conſidered as a wager policy, or like "*intereſt or no intereſt*." If it were, it would be void, by the ſtatute of 19 *Geo.* II. c. 37. The only effect of the valuation, is fixing the amount of the prime coſt, juſt as if the parties admitted it at the trial: but in every argument, and for every other purpoſe, it muſt be taken, that the value was fixed in ſuch a manner, as that the inſured meant to have an indemnity only, and no more. If it be undervalued, the merchant himſelf ſtands the inſurer for the reſt. If it be much overvalued, it muſt be done with a bad view, either to gain, contrary to the 19th of *George* the Second, or with ſome view to a fraudulent loſs; therefore, the inſured never can be allowed to plead in a court of juſtice, that he has greatly overvalued, or that his intereſt was merely a trifle. Vide poſt, c. 14.

It is ſettled, that upon valued policies, the merchant need only prove ſome intereſt to take them out of the 19th *Geo.* II.; becauſe the adverſe party has admitted the value: and if more proof were required, the agreed valuation would ſignify nothing. But if it ſhould come out in proof, that [109]

(*a*) In Lord *Mansfield*'s argument, in anſwer to the firſt objection, I have taken the liberty of abridging much of what fell from his Lordſhip, having already inſerted it, in the former part of the chapter, where I laid down the rules of deciſion upon this point.

a man

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a man had inſured 2,000 *l.* and had intereſt on board to the value of a cable only; there never has been, and, I believe, there never will be a determination, that, by ſuch an evaſion, the act of parliament may be defeated. There are many advantages from allowing valued policies: but where they are uſed merely as a cover to a wager, they would be conſidered as an evaſion. To argue that there can be no adjuſtment of a partial loſs upon a valued policy, is directly contrary to the very terms of the policy itſelf. It is expreſsly *ſubject to average*, if the loſs upon ſugars exceed 5 *per cent.*; and even if it were not ſubject to average, the conſequence would be, that every partial loſs muſt thereby become total; but only the event, to entitle the inſured to recover, would not happen, unleſs there was a total loſs. Conſequently the plaintiff in this caſe would not be entitled to recover at all; for there is no colour to ſay that this was a total loſs; beſides the plaintiffs have taken the goods and ſold them.

In oppoſition to the meaſure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of two grounds.

1ſt. Becauſe the general rule of eſtimating ſhould be the difference between the price the damaged goods ſell for, and the prime coſt or value in the policy. Here the damaged ſold at 20 *l.* 0 *s.* 8 *d. per* hogſhead; and the underwriter ſhould make it up 30 *l.* To this I anſwer, that it is impoſſible that ſhould be the rule: it would involve the underwriter in the riſe or fall of the market: it would ſubject him, in ſome caſes, to pay vaſtly more than the loſs; in others, it would deprive the inſured of any ſatisfaction, though there was a loſs. For inſtance, ſuppoſe the prime coſt or value in the policy 30 *l. per* hogſhead; the ſugars are injured; the price of the beſt is 20 *l.* a hogſhead; the price of the damaged is 19 *l.* 10 *s.* The loſs is about a fortieth, and the inſurer would be to pay above a third. Suppoſe they come to a riſing market, and the ſound ſugars ſell for 40 *l.* a hogſhead, and the damaged for 35 *l.* the loſs is an eighth, yet the inſurer would be to pay nothing.

Vide ſupra, Dick v. Allen, p. 104.

The

The 2d ground, upon which the plaintiffs contended that the 30 *l.* ſhould be made up, is, that it appears the ſugars would have ſold for that price, if the damage from the ſea water had not made an immediate ſale neceſſary. The moment the jury brought in their verdict, I was ſatisfied that they did right, in totally diſregarding the particular circumſtances of this caſe: and I wrote a memorandum at *Guildhall*, in my note-book, that the verdict ſeemed to me to be right. As I expected that the other cauſe upon the ſame point would be tried, I thought a good deal upon the queſtion, and endeavoured to get what aſſiſtance I could, by converſing with ſome gentlemen of experience in adjuſtments. The point has now been fully argued at the bar; and the more I have thought, the more I have heard upon the ſubject, the more I am convinced, that the jury did right to pay no regard to theſe circumſtances.

The nature of the contract is, that the goods ſhall come ſafe to the port of delivery, or if they do not, that the inſurer will indemnify the plaintiff to the amount of the prime coſt. If they arrive, but leſſened in value; in order to indemnify the owner, he muſt be put in the ſame condition, in which he would have been if the goods had arrived free from damage: that is by paying ſuch proportion or *aliquot* part of the prime coſt, as correſponds with the proportion or *aliquot* part of the diminution in value occaſioned by the damage.

The duty accrues upon the ſhip's arrival and landing her cargo at the port of delivery: the inſured has then a right to demand ſatisfaction. The adjuſtment can never depend upon future events or ſpeculations. How long is he to wait? a week, a month, or year?

In this caſe, the price roſe: but if the congreſs had taken place, or a peace had been made, it would have fallen. The defendant did not inſure, that there ſhould be no congreſs or peace. It is true Mr. *Bourdieu* acted upon political

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speculation, and ordered the sugars to be kept till the price should be 30 *l.* and upwards; but no private scheme or project of trade of the insured can affect the insurer; for he knew nothing of it. The defendant did not undertake that the sugars should bear a price of 30 *l.* a hogshead. If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience: the underwriter knows nothing of them: the orders here were given after the policy was signed. But the decisive answer is, that the insurer has nothing to do with the price; and that the right of the insured to a satisfaction arises immediately upon their being landed at the port of delivery.

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We are of opinion, that the plaintiffs are not entitled to have the price, for which the damaged sugars were sold, made up 30 *l. per* hogshead: and it seems to us as plain as any proposition in *Euclid*, that the rule by which the jury have gone, is the right measure.

Le Cras v. Hughes, 2 R. R. East. 22 Geo. III. Vide post, c. 14.

In a subsequent case, which will hereafter be mentioned for another purpose, Lord *Mansfield* said, that the case of *Lewis* v. *Rucker* should be the rule in all similar cases, that is, wherever there was a specifick description of casks or goods: but in *Le Cras* v. *Hughes*, the property, which consisted in various goods taken from an enemy, was valued at the sum insured, and part was lost by perils of the sea; consequently the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that sum, as the amount of the goods lost.

Since the 19th of *Geo.* II. the constant usage has been to let the valuation fixed in the policy remain, in case of a total loss, unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly over-valued the goods: but a partial loss opens the policy. This custom, said Lord *Mansfield*, was introduced by Lord Chief Justice *Lee*;

Lee, in a case of *Erasmus* v. *Banks*; and in another case of *Smith* v. *Feaney*, which happened about the same period, the same rule of decision was adopted. CHAP. VI. M. 21 Geo. II.

By the ordinances of *Hamburgh* it is declared, that in case of a damage to goods, the assured is not to open the damaged goods, but in the presence of the assurers or their deputies; but if time and circumstances do not give opportunity to call them, yet the goods must not be opened, but in the presence of a notary, and some witnesses. I can find no such regulation in the law of insurance in *England*, nor do I understand, that any such is adopted in practice. Indeed it seems to be needless; because an assured, in order to entitle himself to recover for a partial loss, must prove by disinterested witnesses, to the satisfaction of the jury, the quantity of goods damaged in the course of the voyage. The parties may, however, insist upon being present. 2 Magens 228. [112]

It will be proper here to remark that some goods are of a perishable nature; and therefore, when they are damaged by such natural and inherent principle of corruption in themselves, the underwriters, by the ordinances of most countries, are held to be discharged. The underwriters of *London* have, indeed, by express words, inserted in their policy, declared, that they will not be answerable for any partial loss, happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded (*a*). This clause was introduced by the underwriters, to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of those commodities, which we have just had occasion to enumerate. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off Ord. of France, Stockholm, and Hamburgh. Vide Appendix, No. 1.

(*a*) In a late case at Guildhall, Lord *Kenyon* told the jury that a ship's running on some wooden piles, four feet under water, erected in *Whitbeach* river, about nine yards from the shore, but placed there to keep up the banks of the shore, and lying on such piles, till they were cut away, was a stranding within the policy, so as to subject the underwriter to an average loss on corn. The jury found accordingly. Dobson v. Bolton, Sittings after Easter, 1799.

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again, the insured recovered a small partial loss against the *London* Assurance Company; since which period, the Companies have left out the words, "*or the ship be stranded*," and are now only liable, in cases of a general average; but the old form is still retained by private insurers.

Cantillon v. the London Assur. Comp. cited in 3 Burr. 1553.

Upon this clause there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for a partial loss to such commodities unless the ship be stranded: and that no loss of such commodities shall be deemed a total one, but the absolute destruction of the thing insured; for that while it specifically remains, though perhaps wholly unfit for use, no loss has happened within the meaning of this memorandum. It may also be proper to premise that *corn* is a general term, and includes many particulars; peas and beans and malt have been held to come within the meaning of the word.

Mason v. Skurray. Vide post, Moody v. Surridge, Sitt. bef. Ld. Kenyon, after Hill. 1798.

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But in the Court of Common Pleas Mr. Justice *Wilson* was of opinion, that the term *salt* used in the memorandum did not include salt-petre.

Journu v. Bourcieu, Sitt. after Easter Term, 27 Geo. III.

Wilson v. Smith, 3 Burr. 1550.

An action upon a policy of insurance was brought for the recovery of 56 *l.* 19 *s.* 8 *d. per cent.* being the damage received by a cargo of wheat on board the *Betscawen* insured at and from *Lancaster* to *Rotterdam*. The wheat was valued by agreement at 30 *s. per* quarter. The policy was in the ordinary form, with the usual clause at the bottom, that corn, fish, fruit, *&c.* should be warranted free from average, unless general, or the ship be stranded. The defendant underwrote this policy for 100 *l.* The defendant having pleaded the general issue, the cause came on to be tried; and a special case was reserved for the opinion of the Court, stating, that after the ship's departure from *Lancaster*, and before her arrival at *Rotterdam*, she met with a violent storm: that she was, by and through the force of winds and stormy weather, obliged to cut away, and leave her cable and anchor, for the safety of the ship and cargo: that she was also greatly damaged and obliged to run to the first port to refit: that the

expence

expence of refitting the ſhip amounted to 38 *l.* 15 *s. per cent.* which the defendant in this caſe had paid, being a general average. The caſe then ſtates, that the hatches were not opened at *Liverpool* (the place where ſhe had gone to repair); but the ſhip, being refitted, proceeded on her voyage, and arrived at *Rotterdam*, where her cargo of wheat was landed: that upon her unloading it, it appeared that it had received partial damage by the ſaid ſtorm to the amount of 56 *l.* 19 *s.* 8 *d. per cent.*

The ſingle queſtion was, upon the true conſtruction and meaning of the words, "*free from average, unleſs general, or "the ſhip be ſtranded,*" whether the plaintiff, as there had been a general average, could under the circumſtances recover in this action for the damage of 56 *l.* 19 *s.* 8 *d. per cent.* partial average, though the ſhip had not been ſtranded. After two arguments, the Court gave judgment for the defendant.

Lord *Mansfield.*—"Policies of inſurance, according to their preſent form, are very irregular and confuſed: an ambiguity ariſes in them from uſing the ſame words in different ſenſes; particularly, in the uſe of the word *average.* It is uſed to ſignify a contribution to a general loſs; and it is alſo uſed to ſignify a particular partial loſs. But whether it be conſidered in one, or other of theſe ſenſes, it will not avail the plaintiffs in this caſe. For if it here ſignify *contribution*, the inſurer is to be free from contribution, unleſs the contribution be general. If it ſignify *loſs*, then plainly it is warranted free from all particular loſs. The inſurer is liable to all loſſes ariſing from the ſhip being ſtranded; and in all caſes, where there is a general average: but all other partial loſſes are excluded by the expreſs terms of the policy.

The word "unleſs" means the ſame as "except;" and never can be conſtrued as a condition, in the ſenſe that the counſel for the plaintiffs would put upon the word "condition," namely, to be free from partial loſs, unleſs in two events, *viz.* a general average, or the ſtranding of the ſhip; but if either of thoſe events did happen, then to be liable

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to all other average. The words "free from average unleſs "general," can never mean to leave the inſurer liable to any particular damage. It is clear then that the plaintiff ought not to recover; and that judgment ought to be given for the defendant."

Cocking v. Fraſer, B R. Eaſt. 25 Geo. III. Vide ante, p. 21.

In a modern caſe a queſtion aroſe upon the memorandum. It was an action brought upon a policy of inſurance to recover againſt the underwriters for a *total* loſs of the cargo. The jury found a verdict for the plaintiff, ſubject to the opinion of the Court upon a ſpecial caſe.

The caſe ſtates, that the ſhip ſailed from *Newfoundland* on the 2d of *December* 1783, with a cargo of fiſh: that on the 11th they hove overboard 40 quintals for the general preſervation of the ſhip and cargo: that on the 20th, they threw over 20 quintals more for the ſame purpoſe. The ſhip had exceeding bad weather till her arrival at *Liſbon*, on the 10th of *January* 1784, the ſhip being bound to *Figara*. When ſhe arrived at *Liſbon*, a ſurvey was had at the requeſt of the captain, who was alſo the conſignee of the goods, by the Board of Health; and it appeared to them, and ſo the fact was, that the cargo was of *no value* through ſea damage.

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The ſhip did not proceed to *Figara*. The defendant has paid into Court the amount of the partial loſs ſuſtained by the ſhip, and alſo the general average upon the cargo.

Lord *Mansfield*.—"Moſt litigations ariſe from improper ſtatements of caſes, and from not properly defining terms. This clauſe relative to fruit and fiſh, is now a very old one in policies of inſurance. The inſurer undertakes for all loſſes, except particular damage, unleſs the ſhip be ſtranded: he engages againſt a total loſs. What is a total loſs? The total loſs of the thing inſured is the *abſolute deſtruction* of it, by the wreck of the ſhip. The fiſh may all come to port; though, from the nature of the commodity, it may be damaged, it may be ſtinking: ſtill as the commodity *ſpecifically* remains, the underwriter is diſcharged."

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The other judges concurred, Mr. Juſtice *Buller* obſerving, that from the firſt introduction of the clauſe in the year 1749, till the preſent time, the underwriter never has been held anſwerable for total loſſes, but in caſes where there has been a total loſs of the commodity.

So alſo in an inſurance on fruit from *Liſbon* to *London*, it appeared that the ſhip was captured, and recaptured, brought into *Portſmouth*, and afterwards arrived at *London*: but the cargo, by the capture, recapture, and conſequent length of the voyage, had ſuſtained a damage of 80 *l. per cent.* The aſſured, however, never heard of the capture till the ſhip was ſafe at *Portſmouth*, and then he offered to abandon. M'Andrews v. Vaughan, Sittings at G. H. after Mich. 1793.

Lord *Kenyon*.—"As there has been no ſtranding, there cannot be a recovery for a partial loſs. The queſtion then is, Whether the aſſured can recover for a total loſs? Had the plaintiff heard of the capture only, he might have abandoned: but he hears nothing of the accident till the ſhip is in ſafety. The cargo arrives at the port of deſtination; and though it is good for very little, yet it has invariably been held that the voyage muſt either be loſt, or the cargo, if it be one of thoſe mentioned in the memorandum, muſt be wholly and actually deſtroyed to entitle the aſſured to recover." The plaintiff was nonſuited.

The effect of the memorandum has been alſo very recently diſcuſſed by the whole Court, in an action on a policy on *wheat* and coals, the declaration ſtating the loſs to be by *detention*. It appeared in evidence that the ſhip was forced by ſtreſs of weather into *Elly* Harbour in *Ireland*, and there happening to be a great ſcarcity of corn there at that time, the people came on board the ſhip in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which ſhe drove upon a reef of rocks, where ſhe was ſtranded, and they would not leave her till they had compelled the captain to ſell all the corn (except about 10 tons) at a certain rate. The 10 tons were loſt in conſequence of the ſtranding, by which it was damaged, and Neſbitt v. Luſhington, 4 Term R. 783.

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obliged to be thrown overboard. The ship afterwards arrived with the rest of the cargo at the place of destination. A verdict was found as for a total loss. A motion was made for a new trial. There were other points in the cause, one of which has been already considered. As to this upon the the memorandum,

See ante, p. 78.

Lord *Kenyon* said—"This being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless general, or the ship be stranded. And I am of opinion that this is not a general average; because the whole adventure was never in jeopardy. There is no pretence to say that the persons, who took the corn, intended any injury to the ship or any other part of the cargo but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a perishable nature: as it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies, to prevent disputes; and by it the underwriters expressly provide they will not pay any average, unless general, or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained. Therefore here all the damage done to the cargo thrown overboard may be ascribed to the stranding; but the objection is, that the declaration imputes the loss to another cause."

Mr Justice *Buller*.—"With respect to the objection, that this does not fall within the reason of the memorandum; there are only two instances, in which the owner may recover an average loss on the articles there enumerated; either where the average is general, or where the loss arises from the stranding of the vessel. Now this cannot be said to be a general average, for the reasons already given. And as

as to the other inſtance of ſtranding, the plaintiffs are entitled to recover for any loſs occaſioned to the cargo in conſequence of the ſtranding, provided it be a direct and immediate conſequence of ſtranding: but they cannot recover for that which was taken by the mob; for that was not the conſequence of the ſtranding, but, on the contrary, the ſtranding was occaſioned by the mob coming on board for the corn. The rioters took poſſeſſion of the ſhip in order to get at the cargo: but this loſs cannot be aſcribed to the ſtranding. Suppoſe the mob had taken out 100 quarters of corn before the ſhip had been ſtranded, and had uſed no threat to deſtroy the whole, if it were not delivered to them, it is clear that the underwriters would not be liable. Then the fact of their taking the corn after ſhe was ſtranded is as much unconnected with that circumſtance as if it had been before. But the loſs which happened to that part of the cargo which was thrown overboard, being aſcribeable to the ſtranding, and being a direct and immediate conſequence of the peril inſured againſt, might have been recovered, had there been any count in the declaration applicable to a loſs by ſtranding.'

Still it remained a queſtion which has been much agitated in *Weſtminſter* Hall, whether the words *unleſs ſtranded* were to operate as a condition, ſo as to allow the aſſured to recover for a partial loſs of the commodity, if that event happened, though it could be ſhewn demonſtrably that no part of the loſs had ariſen immediately from the act of ſtranding. Lord *Kenyon* in a caſe before him at *Niſi Prius*, upon this ſubject, had been of opinion, that as the general mode of conſtruing deeds, to which there are exceptions, was to let the exception controul the inſtrument, as far as the words of it extend, and no further; and then upon the caſe being taken out of the letter of the exception, the deed operates in its full force; ſo the ſtranding of the ſhip put fiſh in the ſame condition as any other commodity not mentioned in the memorandum: for otherwiſe there would be very conſiderable difficulty in aſcertaining how much of the loſs aroſe by the perils inſured againſt, and how much by the periſhable nature of the commodity,

Bowring v. Elmſlie, Sitt. after Trin. 1790.

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modity, which was the very thing the memorandum intended to prevent.

This point, however, ſtill remained in doubt, till the famous cauſe of *Burnett* v. *Kenſington*, which was as much diſcuſſed as any caſe that ever aroſe at *Guildhall*, and which, after three trials by jury, and two ſpecial arguments upon the caſe reſerved at the laſt of thoſe trials, was at laſt unanimouſly decided by the whole court, in favour of the aſſured. It was an inſurance on fruit, the policy containing the uſual memorandum, and the declaration ſtated the loſs to be that the veſſel by perils of the ſea was *ſtranded*, bulged, and deſtroyed, whereby the goods were loſt. The caſe ſtated that the veſſel in the courſe of her voyage ſtruck upon a ſunken rock, on which ſhe did not remain, but in conſequence of it, ſeveral of her planks were ſtarted, and the water immediately flowed into the hold and over the cargo: that on the ſame day ſhe was *ſtranded* at *Scilly*, by direction of the pilot for the preſervation of ſhip and cargo. While ſhe continued on the beach the water again flowed in over the cargo, which was very much damaged, and a ſmall part was left at *Scilly*, as wholly unfit for uſe. *The ſhip received no damage in conſequence of the ſtranding.* The damage ſhe received was entirely from the rock, on which ſhe ſtruck: part of the damage the cargo received was occaſioned by the water flowing into the ſhip previous to her being laid on the beach, and part was occaſioned by the water that flowed in afterwards; but the cauſe of the water flowing in aroſe entirely from the ſhip ſtriking on the rock, and not from any miſchief done to the ſhip by the ſtranding. After full argument, and conſideration of all the caſes,

Burnett v. Kenſington, 7 Term R. 210.

Lord *Kenyon* ſaid—"The words of this policy are in general terms, including all caſes; then comes this memorandum "corn, fruit, &c. unleſs general, or the ſhip be ſtranded." This therefore lets in a general average; and I do not know how to conſtrue the words grammatically, but by ſaying that if the ſhip be ſtranded, then it deſtroys the exception, and lets in

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in the general words of the policy. If a general proviſion be made in any deed or inſtrument, and it is there ſaid that certain things ſhall be excepted, unleſs another thing happen which gives effect to the general operation of the deed, if that other thing do happen, it deſtroys the exception altogether. My two opinions that have been referred to, the one in the *Niſi Prius* caſe, and the other in *Neſbitt* v. *Luſhington*, have no weight with me as judicial authorities; but I confeſs I have not been able to extricate my mind from the reaſoning that led me to the concluſion in thoſe caſes. Without enquiring into the reaſons for introducing this exception, on the grammatical conſtruction of the whole I have no doubt." His Lordſhip then went into a conſideration of the caſes of *Cantillon* v. *The London Aſſurance Company*, *Wilſon* v. *Smith*, and *Cocking* v. *Fraſer*; and proceeded—"If it had been intended that the underwriters ſhould only be anſwerable for the damage that ariſes *in conſequence of the ſtranding*, a ſmall variation of expreſſion would have removed all difficulty; they would have ſaid "unleſs for loſſes ariſing *by* ſtranding." But in the body of the policy they have inſured againſt all loſſes from the cauſes there enumerated, which include ſtranding; and then follows this memorandum, the evident meaning of which is, *free from average* unleſs general, *or unleſs the ſhip be ſtranded*; ſo that if the ſhip be ſtranded, the inſurers ſay they will be anſwerable for an average loſs. That appears to me to be the true ſenſe and the grammatical conſtruction of the policy; and therefore I am bound to give the ſame opinion I formerly gave, not becauſe I gave that opinion before, but becauſe I am convinced by the reaſoning that led to it."

Bowring v. Elmſlie, ſupra.

Supra.

Aſhburſt, *Groſe*, and *Lawrence*, Juſtices, alſo delivered their opinions, and judgment was given for the plaintiff.

There is indeed a caſe in Sir *John Strange*'s Reports, which ſeems to militate againſt the above deciſions of *Cocking* v. *Fraſer* and *M'Andrews* v. *Vaughan*.

Boyfield v. Brown, 2 Stra. 1065.

Upon

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Upon the execution of a writ of enquiry before Lord *Hardwicke*, when Chief Juſtice, it appeared, that the defendant was an inſurer to the amount of 200 *l.* upon corn, the value of which was 217 *l.*: that the corn was ſo damaged in the voyage, that it ſold for 67 *l.* only, and the freight came to 80 *l.* The queſtion upon this caſe was, Whether, as the freight exceeded the ſalvage, this was not to be conſidered as a total loſs? The Chief Juſtice was of opinion, that within the reaſon of deducting the freight, when the ſalvage exceeds it; the plaintiff in this caſe, wherein it fell ſhort, was entitled to have it conſidered as a total loſs. The jury accordingly found for the plaintiff.

Upon this caſe, it may be obſerved, that it was decided prior to the introduction of the clauſe, upon which ſo much has lately been ſaid; and conſequently, ſuch a deciſion can have no weight now, becauſe the law is altered on account of
[116] the agreement of the parties. Indeed the caſe I am about to cite was exactly ſimilar in circumſtances to *Boyfield* v. *Brown*: but Lord *Mansfield* in his charge to the jury gave a very different direction, and the jury found accordingly.

Maſon v. Skurray, Sittings after Hill. Term, 1780, at Guildhall. Vide ante, 112.

It was an action brought on a policy of inſurance on goods, on board the *Happy Recovery*, at and from *London* to *St. Auguſtine*, to recover for a total loſs. The cargo was *peas*, which, in a former cauſe on the ſame policy, were held to fall within the general denomination of *corn*, in the memorandum at the foot of the policy. The peas arrived at the place of deſtination; but being much damaged, the produce of them was leſs by about three fourths than the freight, which, on account of the ſhip's arrival at the port of diſcharge, became due. The defence ſet up by the underwriter was, that if the goods mentioned in the memorandum arrive at the market, though a loſs amounting to a total one has happened, the underwriters are not liable. Four or five witneſſes converſant in ſettling loſſes upon policies being called, proved, that the uſage was, in ſuch caſes, to hold the underwriter diſcharged.

Lord

Lord *Mansfield* told the jury, "this was a queſtion of conſequence, and it turned upon the general import of the exception: the witneſſes examined have put it on that point; and they hold, that if the ſpecifick thing come to the port of delivery, the underwriter cannot be called on. How did this matter ſtand before the year 1749? When the policy was general, and operated as an indemnity, there was little difference between a total and a partial loſs. His lordſhip here ſtated the determination of *Boyfield* v. *Brown*, which, he obſerved, was prior to the clauſe in queſtion. But the caſes now ſtand upon the memorandum, which is in very general words. The queſtion is, Whether the uſage has not explained the generality of the words? If it has, every man, who contracts for a policy under uſage, does it, as if the point of uſage were inſerted in his contract *in terms*. The witneſſes examined all ſwear it to be *underſtood*, that if the ſpecifick thing comes to the market, the memorandum warrants the inſurer to be free from any demands for an average, or partial loſs." The jury found for the defendant.

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The caſe of *Boyfield* v. *Brown* has certainly been overturned by this deciſion, which was recognized as a proper determination in the caſe of *Baillie* v. *Modigliani*, before cited, where Mr. Juſtice *Buller* ſaid, that the caſe in *Strange*'s Reports had been expreſsly over-ruled by the Court in the caſe of *Maſon* v. *Skurray*.

Vide ante, c. 2. p. 53.

When the quantity of damage ſuſtained in the courſe of the voyage is known, and the amount, which each underwriter upon the policy is liable to pay, is ſettled, it is uſual for the underwriter to endorſe on the policy, "*adjuſted this* "*loſs, at ſo much per cent.*" or ſome words to the ſame effect. This is called an adjuſtment.

It has been determined, that after an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances reſpecting it. This, it is ſaid, has been the invariable cuſtom upon this ſubject; which ſeems perfectly juſt,

as

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as the underwriter has under his hand expreſsly admitted, that the plaintiff has ſuſtained damage to a certain amount. To be ſure, if any fraud were diſcovered in obtaining the adjuſtment, that might be a ground for ſetting it aſide: but ſuppoſing the tranſaction fair, as we muſt always do till proof is given to the contrary, the rule of not ſuffering the adjuſtment to be contradicted, is fair and equitable.

Hog v. Gouldney, Sittings after Trin. 1745, at Guildhall, Beawes Lex Mer. 310.

An action was brought, by the plaintiff againſt the defendant, on a policy of inſurance, which the latter underwrote in *November* 1743, on the ſhip *George* and *Henry*, captain *Bower*, at and from *Jamaica* to *London*, with a warranty annexed to the policy, that the ſhip ſhould ſail from *Jamaica*, with the fleet that came out under convoy of the *Ludlow Caſtle* man of war. The ſhip ſailed with the fleet under that convoy, but was damaged ſo much, as to oblige her to bear away for *Charleſtown*, where ſhe was condemned and broken up. The plaintiff demanded his inſurance; and all the underwriters, being ſatisfied of the truth of the caſe, paid their loſs, except the

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defendant, who went ſo far as to ſettle it, and according to the cuſtom upon theſe occaſions, underwrote the policy in theſe words, "adjuſted the loſs on this policy, at ninety-eight "pounds *per cent.* which I do agree to pay one month after "date, *London*, 5th *July*, 1745, *Henry Gouldney*."

When the note became due, he inſiſted on fuller proof, particularly of the ſhip's ſailing with convoy, and her condemnation: but as it always was the cuſtom, after adjuſtment and a promiſe to pay, never to require any further proof, but to pay the loſs; and Lord Chief Juſtice *Lee* being of opinion, that this was to be conſidered as a note of hand, and that the plaintiff had no occaſion to enter into the proof of the loſs, the jury found a verdict for the plaintiff. The ſame rule was purſued in the following year in another caſe, before Lord Chief Juſtice *Lee*, between *Hewitt* and *Flexney*.

Beawes Lex Merc. 308.

The words uſed by Lord Chief Juſtice *Lee* are extremely large, and perhaps the true rule upon the ſubject may be better collected from the two following more modern caſes:

Caſe

Caſe on a policy of aſſurance on ſhip and goods from *London* to *Shelburne*, in *Nova Scotia*. The policy had been adjuſted by the defendant, at 50 *per cent.* and it was contended, that he was now bound by that adjuſtment. On the other hand, it was argued that the adjuſtment was not binding; and that if it were, it ought to have been declared upon ſpecially.

Rodgers v Maxlor, Sittings after Trin. 1790.

Lord *Kenyon* ſaid, that he did not think it neceſſary to declare on the adjuſtment ſpecially, that it was *primâ facie* evidence againſt the defendant; but if there had been any miſconception of the law or fact, upon which it had been made, the underwriter was not abſolutely concluded by it. This turned out to be the caſe; and there was a verdict for the defendant.

So in a ſtill later caſe, the plaintiff went to trial, having no other evidence to produce but the adjuſtment; and the witneſs, who proved it, ſwore, that doubts, ſoon after they had ſigned it, aroſe in the minds of the underwriters, and they refuſed to pay; upon which Lord *Kenyon* ſaid, that under theſe circumſtances, the plaintiff muſt go into other evidence, which not being prepared to do, he was nonſuited. In the following term a motion was made to ſet aſide the nonſuit, upon the ground that an adjuſtment was *primâ facie* evidence of the whole caſe, and threw the *onus probandi* upon the underwriter, and that it amounted to more than proof of the defendant's ſubſcription to the policy.

De Garron v. Galbraith, Sittings after Trin. 1795.

Michaelmas Term, 36 Geo. III.

Lord *Kenyon*.—"I admit the adjuſtment to be evidence in the cauſe to a certain extent; but I thought at the trial, and ſtill think, that when the ſame witneſs, who proved the ſignature of the defendant to the adjuſtment, ſaid, that doubts, ſoon after the adjuſtment took place, aroſe in the minds of the underwriters, as to the honeſty of the tranſaction, and they called for further proof, the plaintiff ſhould have produced other evidence: and that by ſhutting the door againſt enquiry after an adjuſtment, would be putting a ſtop to candour and fair dealing amongſt the underwriters." The rule was refuſed.

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The ſpirit of this rule was adopted in a very modern caſe, in an inſurance upon goods on board a *foreign ſhip*, "the "policy to be deemed ſufficient proof of intereſt in caſe of "loſs." The defendant ſuffered judgment to go againſt him by default; and on a motion to ſet aſide the writ of enquiry, the court of King's Bench ſaid, that although ſuch a policy would be void, if made upon a ſhip of this country, by virtue of the ſtatute of the 19th *Geo.* 2. *c.* 37, yet the ſtatute did not extend to policies on foreign ſhips: and in this caſe the underwriter, having ſuffered judgment to go by default, has confeſſed the plaintiff's title to recover; and the amount of that loſs was fixed, by his own ſtipulation in the policy, and which he cannot now controvert.

Thelluſſon v. Fletcher, Dougl. 301.

Vide poſt, c. 14.

One rule relative to adjuſtments remains ſtill to be mentioned, which is, that if an inſurer pay money for a total loſs, and in fact it be ſo at the time of adjuſtment; if it afterwards turn out to be only a partial loſs, he ſhall not recover back the money ſo paid to the inſured. But ſubſtantial juſtice is done, by putting him in the place of the inſured, and giving him all the advantages that may ariſe from the ſalvage.

This rule was ſettled by the King's Bench in the year 1766. It was an action on the caſe for 200 *l.* upon an *indebitatus aſſumpſit*, for ſo much money had and received to the uſe of the plaintiff. *Non aſſumpſit* was pleaded, and iſſue joined. It was brought by the inſurer againſt the inſured, to recover back what he had paid him. At the trial, a caſe was reſerved for the opinion of the court. The facts were; that a policy had been underwritten by the plaintiff, for the inſurance of any of the packet boats that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England*, as his majeſty ſhould direct, for one whole year, commencing the 1ſt of *October* 1763, and to continue to the 1ſt of *October* 1764, incluſive, upon any kinds of goods and merchandizes whatſoever: and it was agreed, that the goods and merchandizes ſhould be valued at the ſum inſured on ſuch packet boat, without farther proof of intereſt than the policy, and to

DaCoſta v. Firth, 4 Burr. 1966.

poſt, p. 164.

make no return of premium for want of intereſt, being on bullion or goods. CHAP. VI.

The caſe then ſtates, that the defendant had an intereſt in bullion, on board the *Hanover* packet, being one of the king's packets between *Liſbon* and *Falmouth*: that on the 2d of *December* 1763, it was totally loſt off *Falmouth*, in a voyage between *Liſbon* and *Falmouth*; and the loſs was adjuſted in writing under the policy, in the words following:—"Adjuſted "a loſs on this policy at 100 *l. per cent.* the *Hanover* packet, "captain *Sherborn*, being totally loſt at *Falmouth*. Should "any ſalvage hereafter be recovered, the inſured promiſes to "refund to the inſurer whatever he may ſo recover, in ſuch "proportion as the ſum inſured bears to the whole intereſt. "*London*, 23 *October* 1764, for *Richard Seward*, *Michael "Firth*."

The inſurer paid the whole money inſured, which was 200 *l.* In *April* 1765, the iron trunk, which contained all the bullion, was fiſhed up; and thereby all the bullion was recovered without prejudice, and delivered to the defendant. [120] The defendant's expence of ſalvage amounted to 63 *l.* 8 *s.* 2 *d.* and deducting that ſum for ſalvage, the nett proportion of his ſhare came to 206 *l.* 11 *s.* 9 *d.* The plaintiff's proportion thereof, in reſpect of his ſubſcription, amounted to 48 *l.* 4 *s.* which was paid into court.

The queſtion was, whether the plaintiff was entitled to recover?

The court held, that this was a policy of a peculiar ſort; and that it was good within the exception of the 19th *George* 2. *c.* 37. which ſays, that certain policies of a particular form ſhall be void, except on effects from any port in *Europe*, or *America*, in the poſſeſſion of the crowns of *Spain* or *Portugal*. This is a mixed policy; partly a wager policy, partly an open one: it is a valued policy, and fairly ſo, without fraud or miſrepreſentation. Therefore the loſs having happened, the inſured is entitled to recover as for a total loſs. The in- Vide poſt, c. 14.

 ſurer

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ſurer agreed to the value; and cannot be allowed to diſpute it. The inſured has received the money for a total loſs; and there is no want of conſcience in retaining it. The caſes, cited at the bar, only tend to ſhew, that where it appears, *before* adjuſtment, to be but a *partial loſs*, the underwriter ſhall pay no more than the *real* damage: the reaſon of which deciſion is, that the inſured muſt ſhew the whole caſe, as it then ſtood. But in the preſent caſe, there was a total loſs *at the time* of the adjuſtment. The adjuſtment in this caſe makes an end of the queſtion. Here is a ſolemn abandonment, and a ſolemn agreement, "that the inſurers ſhall be content with "ſalvage in ſuch proportion as the ſum inſured bears to the "whole intereſt." There was a total loſs at the time of the adjuſtment (which is the ſame as if the damages had then been recovered in an action). Here is no ſort of fraud, nor any thing that is againſt any law: and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore the nett proportion only, in reſpect to the plaintiff's ſubſcription after deduction of ſalvage, ought to be returned, and that is paid into court. The *poſtea* was ordered to be delivered to the defendant.

CHAPTER THE SEVENTH.

Of General or Groſs Average.

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AVERAGE, in that ſenſe in which we are now to conſider it, ſignifies a contribution to a general loſs: but in order to ſatisfy the reader, it will be neceſſary to give a more particular deſcription of it. 3 Burr. 1555.

Whatever the maſter of a ſhip in diſtreſs, with the advice of his officers and ſailors, deliberately reſolves to do, for the preſervation of the whole, in cutting away maſts or cables, or in throwing goods overboard to lighten his veſſel, which is what is meant by jettiſon or jetſon, is in all places permitted to be brought into a general or groſs average; in which all who are concerned in ſhip, freight, and cargo, are to bear an equal, or proportional part, of the loſs of what was ſo ſacrificed for the common welfare; and it muſt be made good by the inſurers in ſuch proportions, as they have underwritten. Beawes 147. In the works of writers upon commercial affairs, we very often meet with the word contribution, alſo ſignifying the thing juſt deſcribed: and in a marine ſenſe, average and contribution are ſynonimous terms. Magens 55.

This obligation, which, by the laws of all the maritime countries in *Europe*, binds the proprietor of the goods or ſhip ſaved to contribute to the relief of thoſe whoſe goods are thrown overboard, is founded on the great principle of diſtributive juſtice: for it would be hard that one man ſhould ſuffer by an act, which the common ſafety rendered neceſſary; and that thoſe who received a benefit from that act ſhould make no ſatisfaction to him who had ſuſtained the loſs.

This obligation, which is tacitly entered into by all who have property at ſea, was introduced by the *Rhodians*. Their laws moſt equitably enacted, that all the property on board Leg. Rhod. ſ. 2. art. 9.

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ſhould contribute to this neceſſary and general loſs; and in modern conſtitutions we find very little alteration in the doctrine of averages, from that eſtabliſhed at *Rhodes*. Similar regulations were made by the laws of *Wiſbuy*, and as I have already ſaid, they are now become general. From *Molloy* we learn, that the *Rhodian* laws upon this ſubject were introduced into *England* by *William* the Conqueror.

Laws of Wiſbuy, art. 20 l 2. c. 6. ſ. 3.

Beawes Lex Merc. 140.

Beawes is of opinion, that in order to make the act of throwing the goods overboard legal, three things muſt concur.

1ſt, That what is ſo condemned to deſtruction, be in conſequence of a deliberate and voluntary conſultation held between the maſter and men.

2dly, That the ſhip be in diſtreſs, and that ſacrificing a part be neceſſary in order to preſerve the reſt.

3dly, That the ſaving of the ſhip and cargo be actually owing to the means uſed with that ſole view.

But of theſe the firſt and third propoſitions may be doubted, as the ſecond point alone ſeems to be all that is neceſſary.

Laws of Wiſbuy, art. 20.

Laws of Oleron, art. 8.

It appears alſo, by the laws of *Wiſbuy*, that in an emergency of ſuch a nature as to juſtify lightening the ſhip, it was neceſſary firſt to conſult the owner of the goods or the ſupercargo: but if they would not conſent, the merchandize might, notwithſtanding their refuſal, be ejected, if it appeared neceſſary to the reſt of the people on board; a regulation evidently founded in neceſſity, to prevent a ſordid individual from obſtructing a meaſure ſo eſſential to the general ſafety.

Beawes 148. Molloy, l 2. c. 6. ſ. 2.

If the ſhip ride out the ſtorm, and arrive in ſafety at the port of deſtination, the captain muſt make regular proteſts, and muſt ſwear, in which oath ſome of the crew muſt join, that the goods were caſt overboard for no other cauſe, but for the ſafety of the ſhip and the reſt of the cargo. And as the law has authorized ſuch proceedings in theſe caſes of immi-

nent neceſſity, it will protect thoſe who act *bonâ fide*, and will indemnify them againſt all conſequences. Thus in an action of treſpaſs againſt a man for throwing goods overboard, he pleaded ſpecially, that it was done in a ſtorm, in a caſe of neceſſity, *navis levandæ cauſâ*; and if that act had not been done, that the paſſengers muſt all have periſhed. The court held, that the plea was good, and the defendant had judgment. Mouſe's caſe, 12 Co. 63.

It is evident from one of the rules above ſtated, that there can be no contribution without the ejection of ſome goods, and the ſaving of others: but it is not always neceſſary for the purpoſe of contribution, that the ſhip ſhould arrive at the port of deſtination.

If the jettiſon does not ſave the ſhip, but ſhe periſh in the ſtorm, there ſhall be no contribution of ſuch goods as may happen to be ſaved; becauſe the object, for which the goods were thrown overboard, was not attained. But if the ſhip, being once preſerved by ſuch means, and continuing her courſe, ſhould afterwards be loſt, the property ſaved from the ſecond accident, ſhall contribute to the loſs ſuſtained by thoſe whoſe goods were caſt out upon the former occaſion. Ord. Lew. 14. tit. Contribu. art. 15, 16. Ord. of Hamb. 2 Mag. 240. Ord. of Rotterdam, 2 Magens 98. But ſee page 122.

Magens, in his preliminary Eſſay on Inſurances, advances a different doctrine, and contends, that if a ſhip be ſaved by throwing goods overboard, and afterwards periſh by another calamity, the goods ſaved ſhall not contribute to the former loſs. He puts a caſe to illuſtrate his meaning; but the ordinances above referred to, as will appear from the abſtract of them in the preceding paragraph, directly contradict his poſitions, although he ſeems to have had thoſe ordinances in view when he advanced them. It was neceſſary to ſay thus much, becauſe the doctrines of ſuch an uſeful writer are often received implicitly; erroneous opinions are adopted and confirmed, becauſe they are not accurately examined: and the more reſpectable the writer is, the greater is the danger which is to be apprehended. But what is ſtill more remarkable, in the very next paragraph to that I laſt mentioned, he puts a 1 Mag. 56. 1 Mag. 57.

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similar case, in which he admits that the goods saved ought to contribute.

The writers upon this subject have stated with much minuteness and accuracy, the various accidents and charges, that will entitle the party suffering to call upon the rest for a contribution. I doubt whether it be necessary to be so particular in this place; because, we may gather in general from the description given of average at the beginning of this chapter, that all losses sustained, and expences incurred voluntarily and deliberately, with a view to prevent a total loss of the ship and cargo, ought to be equally borne by the ship and her remaining lading. Such for instance is the damage sustained, in defending a ship against an enemy or pirate: such is the expence of curing, and attendance upon the officers or mariners wounded in such defence: and such also is the sum which the master may have promised to pay for the ransom of his ship to any privateer or pirate, when taken (*a*). A master who has cut his mast, parted with his cable, or abandoned any other part of the ship and cargo, in a storm, in order to save the ship, is well entitled to this compensation: but if he should *lose* them by the storm, the loss falls only upon the ship and freight; because the tempest only was the occasion of this loss, without the deliberation of the master and crew, and was not done with a view to save the ship and lading. Upon the same principle it is, that by the naval laws of *Wisbuy*, which in this respect, as well as in many others, have been adopted by modern states, it was declared, that when a ship arrived at the mouth of a harbour, and the master, finding that his ship was too heavy laden to sail up, was obliged to put part of the cargo into hoys and barges; the owners of the ship and of the goods that remained, were obliged to contribute, if the lighters perished. But if the ship should be lost, and the lighters saved, the owners of the goods so preserved, were not to contribute to the proprietors of the ship and cargo lost. The difference is this, the lightening of the ship was an act of deliberation for the general benefit: whereas the circumstance

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Beawes Lex Merc. 148.

1 Mag. 64.

Beawes 148.

Art. 56.

Ordin. of France and Rotterdam, 2 Magens 96. 183. Molloy tit. Average, s. 12.

1 Mag. 56.

(*a*) Ransoms are now prohibited by the law of England.

of

of the lighters being ſaved, and the ſhip loſt, was accidental, no way proceeding from a regard for the whole.

It is not only the value of the goods thrown overboard that muſt be conſidered in a general average; but alſo the value of ſuch as receive any damage by wet, &c. from the jettiſon of the reſt. Beawes 148. Molloy, l. 2. c. 6. ſ. 8.

It is ſaid, that if a ſhip be taken by force, carried into ſome port, and the crew remain on board to take care of and reclaim her, not only the charges of reclaiming ſhall be brought into a general average; but the wages and expences of the ſhip's company during her arreſt, from the time of her capture, and being diſturbed in the voyage. In this idea *Magens* concurs, and aſſerts, that ſuch expences are allowed as average in *London* as well as elſewhere. He denies, however, and as it ſeems, juſtly denies, that an allowance would be made under general average, for ſailors wages and victuals, when they are under a neceſſity of performing quarantine, in which caſe the maſter would have been obliged to maintain and pay them, though his veſſel had arrived only in ballaſt. But at the ſame time he admits, that charges occurring by an extraordinary quarantine ſhall be brought into a general average. Beawes 150. [125] 1 Mag. 67.

It has however been a conſiderable queſtion, Whether the extraordinary wages and victuals expended during the detention by a foreign prince not at war, ought to be brought into a general average, ſo as to charge the underwriter? *Magens* and *Beawes* differ upon the point; the latter being of opinion that it ſhould, the former that it ſhould not. In *England* there is no adjudged caſe, nor any regulation upon the ſubject; and therefore, the only mode by which this and ſimilar queſtions are to be decided, is to conſider, whether theſe expences were neceſſarily and unavoidably incurred, for the general ſafety of the ſhip and cargo.

Lord *Mansfield* ſeems to have been of that opinion in an action upon a policy of inſurance on a *ſhip*. It was brought Lateward v. Curling, G. H. Sittings after Trin. 1776.

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to recover the amount of wages and provisions expended during the time the ship went from *Bengal* to *Bombay* to repair. His lordship, as he has frequently done since upon similar occasions, decided against the action, being an insurance on the ship only, and the item in question being sailors wages. But his lordship said, there may be cases, where exceptions to the general rule should be allowed; but in order to consider a case as excepted, it must be an expence absolutely necessary, and such as could not be avoided, owing to some of the perils stated in the policy.

Vide ante, p. 52. 54.

His lordship here seems to allude to a general average: but on a point, on which no authority can be adduced, I would not chuse that lord *Mansfield*'s words should be supposed to convey an idea, which perhaps the speaker never intended. It does not become me to hazard an opinion; and therefore, I shall leave it as a matter undecided; only observing, that by the ordinances of *Lewis* the Fourteenth, the charges in such a case shall be reputed general average, if the seamen be hired by the month; otherwise, if by the voyage.

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Tit. Average, art. 7.

It may be proper before I close this branch of my subject, to state a paragraph, I have met with, which confirms the idea entertained by Lord *Mansfield*. "Though it must be "noted, says this author, that the charges of unloading a "ship, to get her into a river or port, ought not to be "brought into a general average; but they may when occa- "sioned by an indispensable necessity to prevent the loss "of ship and cargo. As when a ship is forced by a storm "to enter a port to repair the damage she has suffered, if "she cannot continue her voyage without an apparent risk "of being lost; in which case, the wages and victuals of the "crew are brought into an average from the day it was re- "solved to seek a port to refit the vessel, to the day of her "departure from it, with all the charges of unloading, re- "loading, anchorage, pilotage, and every other expence "incurred by this necessity."

Beawes 150.

Since

Since the firſt edition of this work, a queſtion nearly ſimilar came before the court of King's Bench, in which Mr. Juſtice *Buller* quoted the above paſſage from *Beawes*, as alſo the caſe of *Lateward* v. *Curling* in the preceding page: and although the learned judge thought it then unneceſſary to decide the point here agitated, yet the leaning of his mind ſeemed to be in favour of the affirmative. This, however, was held by the whole court, that where a ſhip is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and proviſions of *the workmen hired for the repairs*, become general average.

Da Coſta v. Newnham, 2 Term R. 407.

By the ancient laws of *Rhodes*, *Oleron*, and *Wiſbuy*, the ſhip, and all the remaining goods, ſhall contribute to the loſs ſuſtained. The moſt valuable goods, though their weight ſhould have been incapable of putting the ſhip in the leaſt hazard, as diamonds or precious ſtones, muſt be valued at their juſt price in this contribution, becauſe they could not have been ſaved to the owners but by the ejection of the other goods. Neither the perſons of thoſe in the ſhip, nor the ſhip proviſions, nor reſpondentia bonds, ſuffer any eſtimation; nor does wearing apparel in cheſts and boxes, nor do ſuch jewels as belong to the perſon merely; but if the jewels are a part of the cargo, they muſt contribute.

De leg. Rhod. ſ. 2. art. 8. Oler. art. 8. Wiſb. art 20. Molloy, l. 2. c. 6. ſ. 4.

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Vide poſt, c. 21. Joyce v. Williamſon.

Thoſe who carry jewels by ſea ought to communicate that circumſtance to the maſter; becauſe the care of them will be increaſed in proportion to their worth, to prevent their being thrown overboard promiſcuouſly with other things: and hence their preſervation will be a common benefit.

1 Mag. 63.

Both by law and cuſtom, the wages of ſailors are not to contribute to the general loſs; a proviſion intended to make this deſcription of men more eaſily conſent to a jettiſon, as they do not then riſk their all, being ſtill aſſured that their wages will be paid.

1 Mag. 71.

The

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1 Mag. 69.

The way of fixing a right ſum, by which the average ought to be computed, can only be, by examining what the whole ſhip, freight, and cargo, if no jettiſon had been made, would have produced neat, if they had all belonged to one perſon, and been ſold for ready money. And this is the ſum whereon the contribution ſhould be made, all the particular goods bearing their nett proportion.

Ord. of Genoa and France.

In no reſpect whatever do the ordinances of foreign ſtates differ ſo much, as in the manner of ſettling the contribution of the ſhip and freight. In ſome places, the ſhip contributes for the whole of her value and freight; in others, for the half of her value, and one third of her freight: and again, in others, both ſhip and freight are to contribute for one half.

2 Mag. 207. 237. 339.

By the laws of *Koningſberg*, *Hamburgh*, and *Copenhagen*, the ſhip is to contribute for the whole of her value and freight. They alſo declare, that the value of the ſhip ſhall be that which ſhe was worth when ſhe arrived; and that from the freight a deduction ſhall be made of the men's wages, pilotage, and ſuch other charges, as come under the name of petty average, of which it is cuſtomary every where, as we have before obſerved, for the cargo to bear two thirds, and the ſhip one.

Vide the laſt chapter.

The *Engliſh* writers upon commerce are totally ſilent in this reſpect; and therefore cuſtom muſt be our guide: and I think from that we may collect, that the ſhip, freight (*a*), and cargo, are to bear an equal and proportional part of what was ſo ſacrificed for the common good.

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The ſea laws of different countries vary no leſs than upon the former queſtion, in fixing at what prices goods thrown overboard ſhall be eſtimated, and for what value thoſe ſaved are to contribute.

2 Mag. 106. 285. 339.

By the ordinances of *Rotterdam*, *Stockholm*, and *Copenhagen*, if the accident, which occaſioned the general average, hap-

(*a*) It has been held by the whole court of King's Bench that freight muſt contribute to the general average. *Da Coſta* v. *Newnham*, 2 Term R. 407.

pened

pened before half the voyage was performed, the jettiſon was to be eſtimated at prime coſt; but if after that period, then at the price for which ſuch goods would ſell, at the place of diſcharge, freight, duties, and ordinary charges deducted. That diſtinction is now, however, exploded in *England*, and the cuſtom has become general of eſtimating the goods ſaved and loſt, at the price for which the goods ſaved were ſold; freight and all other charges being firſt deducted. This rule is agreeable to the marine laws of *Wiſbuy*, which declare, that the goods thrown overboard ſhall be brought into a groſs average, and ſhall be rated at the ſame price for which other merchandize of the ſame ſort, preſerved from the ſea or enemy, was ſold. This cuſtom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malyne*, that in 1622, the diſtinction was obſerved of eſtimating the goods at prime coſt, if the jettiſon happened before half the voyage was performed: and if after, at the price the reſt of the goods ſold for, at the place of diſcharge. However, *Molloy* is a more modern authority; and *Magens* ſays, that the prevailing mode of ſettling averages now adopted in *England* is conformable to that rule, which has aboliſhed the diſtinction.

Molloy, tit. Aver. f. 15.

Leg. Wiſb. art. 20.

Malyne Lex Merc. 1ſt part c. 26.

Gold, ſilver, and jewels, at moſt places, contribute to a general average, according to their full value, and in the ſame manner as any other ſpecies of merchandize. It has been ſaid, that an immemorial cuſtom has prevailed at *Amſterdam*, that gold and ſilver ſhall only contribute for half their value: the reaſon for ſuch a cuſtom, one is at a loſs to conjecture. In *England* no ſuch cuſtom prevails; but money and jewels muſt fall into the general average at their full price: and a modern writer aſſures us, that the practice was ſuch in *London* when he wrote; and ſuch I believe it to be at this day.

1 Mag. 62.

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Molloy, tit. Average, f. 4.

1 Mag. 62.

In a late caſe, the doctrine here advanced was mentioned and confirmed by Mr. Juſtice *Buller*, as clear law.

Peters v. Milligan, Sittings at Guildhall after Michaelmas, 1787.

The contribution is in general not made till the ſhip arrive at the place of delivery: but accidents may happen, which may

Roccus de Navibus, Not. 96.

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may cauſe a contribution before ſhe reach her deſtined port. Thus when a veſſel has been obliged to make a jettiſon, or, by the damages ſuffered ſoon after ſailing, is obliged to return to her port of diſcharge; the neceſſary charges of her repairs, and the replacing the goods thrown overboard, may then be ſettled by a general average.

1 Mag. 60.

Thus I have endeavoured to lay before the reader an idea of what is meant by average; and, in order to do that more diſtinctly, I have defined what average is; I have ſhewn its origin; and what the neceſſary requiſites are to render the act, whence averages ariſe, legal. I then ſtated in general what accidents or expences would authorize the ſufferer to call for a contribution: the different kinds of property that were ſubject to ſuch contribution; and laſtly, the mode by which the value of this property was to be aſcertained.

It only remains now to ſtate, that the inſurers are liable to pay the inſured for all expences ariſing from general average, in proportion to the ſums they have underwritten. *Roccus* ſays,

Roccus de aſſecurationibus, Not. 62.

" *Factu facto, ob maris tempeſtatem, pro ſublevanda navi, an teneantur aſſecuratores ad ſolvendum æſtimationem rerum jactarum domino ipſarum? Dic eos non teneri, quia pro rebus jactis fit contributio, inter omnes merces habentes in illa navi pro ſolvendo pretio domino ipſarum, et ideo ſi aſſecuratus recuperat pretium rerum jactarum, non poteſt agere contra aſſecuratores; tamen tenentur aſſecuratores ad reficiendum illam ratam et portionem, quam ſolvit aſſecuratus in illam contributionem faciendo inter omnes, habentes merces in illa navi, quæ portio cum non recuperetur ab aliis, habetur pro deperdita, et proinde ad illam portionem tenentur aſſecuratores.*"

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The opinion of this learned civilian is agreeable to the laws of all the trading powers on the continent of *Europe*, as well as to thoſe of *England*, where the inſurer, by his contract, engages to indemnify againſt all loſſes ariſing from a general average.

In

In former editions of this work, I had contented myſelf with ſtating the nature of general average, and that the ſums paid on this account might be recovered againſt the underwriters. But I had omitted to ſtate what remedy the perſon, whoſe goods were thrown overboard, or who had expended money for the general preſervation of ſhip and cargo, had againſt thoſe, whoſe goods or ſhip were preſerved by ſuch means. In the caſe of an expenditure of money, *probably* an action for money paid *might* be maintained againſt each of thoſe, who were benefited by ſuch expenditure. But as this would lead to a multiplicity of actions; and this ſpecies of action is not applicable to the caſe of goods thrown overboard, the better mode in all caſes ſeems to be to apply for contribution to a court of equity, where effectual relief may be obtained againſt all the parties in one ſuit.

Com. Dig. tit. Chancery, (2 I) and Showe's Parl. Cas.

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future, enacted, that if a ſhip was in danger of being ſtranded or run aſhore, the ſheriffs, juſtices, mayors, conſtables, or officers of the cuſtoms, neareſt the place of danger, ſhould, upon application made to them, ſummon and call together as many men as ſhould be thought neceſſary to the aſſiſtance, and for the preſervation of ſuch ſhip in diſtreſs and her cargo; and that if any ſhip, man of war, or merchantman, ſhould be riding at anchor near the place of danger, the conſtables and officers of the cuſtoms might demand of the ſuperior officer of ſuch ſhip, aſſiſtance by his boats and ſuch hands as could be ſpared: and that if the ſuperior officer ſhould refuſe to grant ſuch aſſiſtance, he ſhould forfeit 100 *l.*

Sect. 2. Then follows the ſection reſpecting ſalvage. "And for the "encouragement of ſuch perſons as ſhall give their aſſiſtance "to ſuch ſhips or veſſels, ſo in diſtreſs as aforeſaid, be it enact- "ed, that the ſaid collectors of the cuſtoms, and the maſter "and commanding officer of any ſhips or veſſels, and all others, "who ſhall act or be employed in the preſerving of any ſuch "ſhip or veſſel in diſtreſs, or their cargoes, ſhall, within thirty "days after the ſervice is performed, be paid *a reaſonable re-* "*ward* for the ſame, by the commander, maſter, or other ſu- "perior officer, mariners, or owners of the ſhip or veſſel ſo "in diſtreſs, as aforeſaid, or by the merchant whoſe veſſel or "goods ſhall be ſo ſaved; and in default thereof, the ſaid ſhip "or veſſel ſo ſaved ſhall remain in the cuſtody of the officers of "the cuſtoms until all charges are paid, and until the officers "of the cuſtoms, and the maſter or other officers of the ſhip "or veſſel, and all others employed in the preſervation of the "ſhip, ſhall be *reaſonably gratified* for their aſſiſtance and trou- "ble, or good ſecurity given for that purpoſe, to the ſatisfac- "tion of the parties that are to receive the ſame: and if any "diſagreement ſhall take place between the perſons, whoſe "ſhips or goods have been ſaved, and the officer of the cuſ- "toms, touching the monies deſerved by any of the perſons ſo "employed, it ſhall be lawful for the commander of the ſhip "or veſſel ſo ſaved, or the owner of the goods, or the mer- "chant intereſted therein, and alſo for the officer of the cuſ- "toms, or his deputy, to nominate three of the neighbouring

"juſtices

" juſtices of the peace, who ſhall thereupon adjuſt the *quan-*
" *tum* of the monies or gratuities to be paid to the ſeveral
" perſons acting or being employed in the ſalvage of the ſaid
" ſhip, veſſel, or goods; and ſuch adjuſtments ſhall be bind-
" ing upon all parties, and ſhall be recoverable in an action
" at law: and in caſe it ſhall ſo happen, that no perſon ſhall [134]
" appear to make his claim to all or any of the goods that
" ſhall be ſaved, that then the chief officer of the cuſtoms of
" the neareſt port to the place where the ſaid ſhip or veſſel
" was ſo in diſtreſs, ſhall apply to three of the neareſt juſtices
" of the peace, who ſhall put him or ſome other reſponſible
" perſon in poſſeſſion of the ſaid goods, ſuch juſtices taking an
" account in writing of the ſaid goods, to be ſigned by the
" ſaid officer of the cuſtoms: and if the ſaid goods ſhall not be
" legally claimed within the ſpace of twelve months next en-
" ſuing, by the rightful owner thereof, then public ſale ſhall
" be made thereof, and if periſhable goods, forthwith to be
" ſold, and after all charges deducted, the reſidue of the mo-
" nies ariſing from ſuch ſale, with a fair and juſt account of
" the whole, ſhall be tranſmitted to her majeſty's Exchequer,
" there to remain for the benefit of the rightful owner, when
" appearing, who, upon an affidavit, or other proof made of
" his or their right or property thereto, to the ſatisfaction of
" one of the barons of the coif of the Exchequer, ſhall, upon
" his order, receive the ſame out of the Exchequer."

The ſtatute then goes on to declare, that any other perſons, Sect. 3.
than thoſe mentioned in the preceding clauſe, endeavouring to enter ſuch ſhip or veſſel without the permiſſion of the ſuperior officer of the ſhip, or of the officer of the cuſtoms, *&c.* or moleſting or hindering them in the preſervation of the ſhip, or defacing the marks of the goods on board ſuch ſhip, ſhall make double ſatisfaction to the party grieved, or, on default thereof, ſhall be ſent to the houſe of correction for twelve calendar months: and that it ſhall be lawful for the officers of the ſhip to repel by force perſons ſo endeavouring to enter without leave.

It is alſo enacted, that if any goods, ſtolen from ſuch ſhip, Sect. 4.
ſhall be found on any perſon, they ſhall be delivered up to the

c. 8 A. K. VIII. true owner; or, in default, ſuch perſon ſhall pay treble the value.

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Sect. 5. The next ſection declares, that any perſon, boring holes in a ſhip in diſtreſs, or ſtealing a pump belonging thereto, ſhall be guilty of felony, without benefit of clergy.

This act was made perpetual by the 4 *Geo.* 1. *c.* 12; and as far as relates to our preſent ſubject, we can collect, that in caſes of wreck, the rate of ſalvage is not fixed, but muſt be *reaſonable*; that is, it muſt be a ſufficient recompence to thoſe, who have encountered dangers for the preſervation of the ſhip and cargo, regard at the ſame time being had to the circumſtances of the owner of the property ſaved: and what ſhall be a ſufficient recompence is to be aſcertained by three juſtices of the peace.

Notwithſtanding this ſalutary law had paſſed, the enormities complained of by the ſtatute of queen *Anne* ſtill continued, to the diſgrace of humanity, and a civilized people; upon which the legiſlature were again obliged to interpoſe by a ſubſequent

26 Geo. II. c. 19. ſtatute, which I ſhould perhaps not have mentioned, had it not contained ſome additional regulations reſpecting ſalvage.

Sect. 1. The ſtatute ordains, that perſons convicted of ſtealing goods from a ſhip wrecked, or in diſtreſs, or of obſtructing the eſcape of any perſon from a wreck, or of putting out falſe lights to lead ſuch ſhip into danger, ſhall ſuffer as felons with-

Sect. 2. out benefit of clergy. But where goods of ſmall value ſhall be ſtolen, without any circumſtances of cruelty, the offender

Sect. 3. may be indicted for petty larceny. Juſtices of the peace, upon information of ſhipwrecked goods being ſtolen or concealed, are empowered to iſſue ſearch warrants; and the perſons in whoſe cuſtody they may be found, refuſing to deliver them on demand, or to give a ſatisfactory account how they became poſſeſſed thereof, ſhall be committed to the common gaol for ſix months, or until payment of the treble value of ſuch goods.

Sect. 4. Goods offered to ſale, ſuſpected of being ſhipwrecked, are to be ſtopped; and notice ſhall be immediately given to a juſtice

of the peace, and if the perſon offering the ſame to ſale cannot make out the property to be lawfully in him, the goods ſhall be returned to the owner, *upon a reaſonable reward for ſuch ſeizure (to be aſcertained by the juſtice)*: and the offender ſhall be committed to the common gaol for ſix months, or until payment of the treble value of the ſaid goods.

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And be it further enacted, "that in caſe any perſon or perſons, not employed by the maſter, mariners, or owners, or other perſons lawfully authorized in the ſalvage of any ſhip or veſſel, or the cargo or proviſion thereof, ſhall, in the abſence of the perſons ſo employed and authorized, ſave any ſuch ſhip, veſſel, goods, or effects, and cauſe the ſame to be carried, for the benefit of the owners or proprietors, into port, or to any near adjoining cuſtom-houſe, or other place of ſafe cuſtody, immediately giving notice thereof to ſome juſtice of the peace, magiſtrate, or cuſtom-houſe or exciſe-officer: or ſhall diſcover to ſuch magiſtrate, or officer, where any ſuch goods or effects are wrongfully bought, ſold, or concealed, then *ſuch perſon or perſons ſhall be entitled to a reaſonable reward for ſuch ſervices*, to be paid by the maſters or owners of ſuch veſſels or goods, and to be adjuſted in caſe of diſagreement about the *quantum*, in like manner as the ſalvage is to be adjuſted and paid, by virtue of a ſtatute made in the 12th of queen *Anne*." Sect. 5. Vide ſupra.

"And be it further enacted, that for the better aſcertaining the ſalvage to be paid in purſuance of the preſent act, and the act before mentioned, and for the more effectual putting the ſaid acts in execution, the juſtice of the peace, mayor, bailiff, collector of the cuſtoms, or chief conſtable, who ſhall be neareſt to the place where any ſhip, goods, or effects, ſhall be ſtranded or caſt away, ſhall forthwith give publick notice for a meeting to be held as ſoon as poſſible of the ſheriff or his deputy, the juſtices of the peace, mayors, or other chief magiſtrates of towns corporate, coroners, or commiſſioners of the land tax, or any five or more of them, who are hereby empowered and required to give aid in the execution of this and the ſaid former act, and to employ proper perſons for the Sect. 6.

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" ſaving of ſhips in diſtreſs, and ſuch ſhips, veſſels, and effects,
" as ſhall be ſtranded, or caſt away; and alſo to examine per-
" ſons upon oath, touching or concerning the ſame, or the
" ſalvage thereof, and to adjuſt the *quantum* of ſuch ſalvage,
" and diſtribute the ſame among the perſons concerned in ſuch
" ſalvage, in caſe of diſagreement among the parties, or the
" ſaid perſons; and that every ſuch magiſtrate, *&c.* attending
" and acting at ſuch meeting, ſhall be paid four ſhillings a day
[137] " for his expences in ſuch attendance out of the goods and
" effects ſaved by their care or direction."

Sect. 7. " Provided always, that if the charges and rewards for ſal-
" vage, directed to be paid by the former ſtatute, and by this
" act, ſhall not be fully paid, or ſufficient ſecurity given for
" the ſame, within forty days next after the ſaid ſervices
" performed, then it ſhall be lawful for the officer of the
" cuſtoms concerned in ſuch ſalvage, to borrow or raiſe ſo
" much money as ſhall be ſufficient to ſatisfy and pay ſuch
" charges and rewards, or any part thereof, then remaining
" unpaid, or not ſecured as aforeſaid, by or upon one or more
" bill or bills of ſale, under his hand and ſeal, of the ſhip or
" veſſel, or cargo ſaved, or ſuch part thereof as ſhall be ſuffi-
" cient, redeemable upon payment of the principal ſum bor-
" rowed, and intereſt for the ſame, at the rate of 4 *per cent.*
" *per annum.*"

Sect. 9. The act alſo declares, that the commiſſioners of the land tax, the deputy-ſheriff, the coroner, and the officers of exciſe in each county, ſhall be the proper officers for putting theſe acts in execution, together with thoſe perſons reſpectively named in the

Sect. 10. act of queen *Anne*. In the Cinque Ports, however, the execution of theſe acts is entruſted to the lord warden of the Cinque Ports, the lieutenant of *Dover* Caſtle, the deputy warden of the Cinque Ports, the judge official and commiſſary of the court of Admiralty of the Cinque Ports, two ancient towns, and the members thereof, and to all and every other perſon and perſons appointed, or to be appointed by the lord warden of the Cinque Ports.

The

The ſtatute proceeds to ſay, that perſons convicted of aſ- Sect. 11 and 12.
ſaulting any magiſtrate or officer, when in the exerciſe of his duty reſpecting the preſervation of any ſhip, veſſel, goods, or effects, ſhall be tranſported for ſeven years; and the juſtices, in the abſence of the ſheriff, may take a ſufficient force with them to repreſs violence. It directs in the laſt place, that the Sect. 15.
officer of the cuſtoms who ſhall act in preſerving any ſhip or veſſel in diſtreſs, or the cargo thereof, ſhall cauſe all perſons belonging to the ſaid ſhip or veſſel, and others who can give any account thereof, or of the cargo thereof, to be examined upon oath before ſome juſtice of the peace, as to the name or deſcription of the ſaid ſhip or veſſel, and the names of the [138]
maſter, commander, or chief officer, and owners thereof, and of the owners of the ſaid cargo, and of the ports or places from or to which the ſaid ſhip or veſſel was bound, and the occaſion of the ſaid ſhip's diſtreſs; which examination the juſtices are to take down in writing, and they ſhall deliver a true copy thereof, together with a copy of the account of the goods to the officer of the cuſtoms, who ſhall tranſmit the ſame to the ſecretary of the Admiralty for the time being, that he may publiſh the ſame, or ſo much thereof, in the *London* Gazette, as ſhall be neceſſary for the information of perſons intereſted therein. This act is not to extend to *Scotland*. Sect. 18.

Thus anxiouſly has the legiſlature provided for the preſervation of property wrecked, thereby diminiſhing thoſe calamities which muſt unavoidably happen to all concerned in foreign commerce; and with no leſs anxiety and wiſdom, it has appointed certain magiſtrates to aſcertain what ſhall be a ſufficient allowance for the ſalvage of a ſhip or goods in caſes of wreck. The neceſſity of leaving the *quantum* to the arbitration of proper perſons, to be decided according to the circumſtances of each caſe, is obvious; becauſe it is impoſſible to ſuppoſe two inſtances of ſuch a calamity ſo ſimilar to each other, that the trouble, danger, and expence of both ſhall be exactly equal. It would be contrary, therefore, to the firſt principles of juſtice to decide, that the ſame ſum ſhould be the allowance, or recompence for every poſſible caſe of ſalvage.

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For inſtance, if a ſhip be found adrift at ſea, having been abandoned by the maſter and crew, it ſeems reaſonable, that the allowance for ſalvage ſhould be greater than in a caſe where a man merely picks up goods caſt upon the ſhore, and carries them to a place of ſecurity. Thus much for ſalvage in caſe of a wreck.

Vide ante, c. 4. p. 71.

We have formerly ſeen, that when the ſhips or goods of *Britiſh* ſubjects were retaken from an enemy, the original owner was entitled, by the marine law, to have them reſtored, upon paying to the recaptors a reaſonable ſalvage, provided the recapture was before condemnation. It was alſo obſerved, that the ſtatute law had extended the right of the original owner; ſo that he was entitled to have his ſhip and goods reſtored to

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him, whether they were retaken after condemnation or before, however diſtant the time of recapture might be from that of the original taking. The ſtatutes have alſo fixed the preciſe rate of ſalvage, which the recaptors ſhall be entitled to demand.

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By the 13 *Geo.* II. ch. 4. and 29 *Geo.* II. ch. 34. Parliament fixed and aſcertained the rate of ſalvage, in caſe of a recapture, proportioning the amount of the reward to the length of time the ſhip or goods had been in the poſſeſſion of the enemy, becauſe the longer they remained in the hands of the enemy, ſo much the leſs was the hope of recovery. At the ſame time, however, thoſe ſtatutes fixed a boundary, beyond which the allowance ſhould not paſs; namely, that in no caſe whatever, ſhould the recaptors be entitled to more than a moiety of the property reſcued from the enemy.

But the ſtatute 33 *Geo.* III. ch. 66. ſ. 42. (which ſection ſee at length ante, p. 72.) has deſtroyed that proportion, and has aſcertained the rate in all caſes, however long the ſhip has been in the enemy's poſſeſſion, to be one eighth, if the recapture has been made by any of his majeſty's ſhips, and one ſixth, if made by a privateer or other ſhip.

It

It is ſaid in the ſtatute, that the ſalvage ſhall be a propor- CHAP. VIII.
tion of the ſhips and goods ſo reſtored: but a writer upon mercantile law obſerves, that the wearing apparel of the maſter and ſeamen are always excepted from the allowance of ſalvage. Beawes Lex Merc. 147.

The ſtatute has alſo ſaid, it muſt be an eighth, or a ſixth, &c. of the *true value*. Now the valuation of a ſhip, in order to aſcertain the rate of ſalvage, may be determined by the policy of inſurance, if there is no reaſon to ſuſpect ſhe is undervalued; and the ſame rule may be obſerved as to goods where there are policies upon them. If that, however, ſhould not be the caſe, the ſalvers have a right to inſiſt upon proof of the real value, which may be done by the merchant's invoices, and they muſt be paid for accordingly. Beawes 147.

The only queſtion then is, how far the inſurers are affected by this allowance of ſalvage. By their own contract they expreſſly agree to indemnify the inſured againſt ſuch charges. Vide the Appendix, No. 1.

"And in caſe of any loſs or misfortune, it ſhall be lawful for "the aſſured, their factors, ſervants, and aſſigns, to ſue, la- "bour and travel for, in and about the defence, ſafeguard, [141]
"and recovery of the ſaid goods and merchandizes, and ſhip, "&c. or any part thereof, without prejudice to this in- "ſurance; to the charges whereof we the aſſurers will con- "tribute, each one according to the rate or quantity of his "ſum herein aſſured."

In the caſe of *Mitchell* v. *Edie* (1 Term Reports, 608.) Mr. Juſtice *Aſhhurſt* ſaid, it ſeemed to him, that the meaning of this clauſe was, that till the aſſured have been informed of what has happened, and have had an opportunity of exerciſing their own judgment, no act done by the maſter ſhall prejudice their right of abandonment.

In order to entitle the inſured to recover the expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy; becauſe an inſurance is againſt all accidents, and ſalvage is an immediate and neceſſary conſequence of ſome of thoſe ſtated in a policy.

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Carey v. King, Caſes in B. R. temp. Hardwicke, 304.

Thus in an action on a policy of inſurance, for inſuring goods on the ſhip A. the plaintiff declared, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled: the evidence was, that many of the goods were ſpoiled, but ſome were ſaved. The queſtion was, Whether the plaintiffs might give in evidence, the expences of ſalvage, that not being particularly ſtated in the declaration, as a breach of the policy?

Lord *Hardwicke*.—"I think they may give it in evidence, for the inſurance is againſt all accidents. The accident laid in this declaration is, that the ſhip ſunk in the river: it goes on and ſays, that by reaſon thereof the goods were ſpoiled. That is the only ſpecial damage laid; yet it is but the common caſe of a declaration that lays a ſpecial damage, where the plaintiff may give in evidence any damage that is within his cauſe of action. It was objected, that ſuch a breach of the policy ſhould be laid, that the inſurer may have notice to defend it. Now it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe it muſt of courſe follow, that ſome damage did happen."

But although the inſured may recover from the inſurer the expences of ſalvage; yet he ſhall only be entitled to an indemnity, and ſhall not receive a double ſatisfaction for the ſame loſs. Thus if the inſurer ſhould have paid to the inſured the expences ariſing from ſalvage; and afterwards, on account of ſome particular circumſtances, the loſs ſhould be repaired by ſome unexpected means, the inſurer ſhall ſtand in the place of the inſured, and receive the ſum thus paid to atone for the loſs.

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Randal v. Cockran, 1 Vez. 98.

It was ſo determined in a caſe before Lord *Hardwicke* in Chancery. The king having granted general letters of repriſal on the *Spaniards* for the benefit of his ſubjects, in conſideration of the loſſes they ſuſtained by unjuſt captures, the commiſſioners would not ſuffer the inſurers to make claim to part of the prizes, but the owners only; although they were already ſatisfied for their loſs by the inſurers, who thereupon brought the

the preſent bill. The Lord Chancellor was of opinion, that the plaintiffs had the plaineſt equity that could be. The perſon originally ſuſtaining the loſs was the owner; but after ſatisfaction made to him, the inſurer becomes the owner. No doubt, but from that time, as to the goods themſelves, if reſtored in ſpecie, or compenſation made for them, the inſured ſtands as a truſtee for the inſurer, in proportion for what he paid; although the commiſſioners did right in avoiding being entangled in accounts, and in adjuſting the proportion between them. Their commiſſion was limited in time; they ſee who was owner; nor was it material to them, to whom he aſſigned his intereſt, as it was in effect after ſatisfaction made.

Caſes, however, may, and do frequently arife, where the ſalvage is ſo high, the other expences are ſo great, and the object of the voyage is ſo far defeated, that the inſured is allowed, by the laws of all trading nations, to abandon his intereſt in the property ſaved to the inſurer, and to call upon him to contribute, as if a total loſs had actually happened. What circumſtances ſhall be deemed ſufficient to juſtify the inſured in making ſuch an abandonment, will be the ſubject of the following chapter.

CHAPTER THE NINTH.

Of Abandonment.

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WE have formerly ſeen, that the inſured, before he can demand a recompenſe from the underwriter for a total loſs, muſt cede or abandon to him his right to all the property that may chance to be recovered from ſhipwreck, capture, or any other peril, ſtated in the policy. It has alſo been obſerved, and from the preceding ſentence it is obvious, that when we ſpeak of a total loſs, with reſpect to inſurances, we do not always mean, that the thing inſured is abſolutely loſt and deſtroyed: but that, by ſome of the uſual perils, it is become of ſo little value, as to entitle the inſured to call upon the underwriter to accept of what is ſaved, and to pay the full amount of his inſurance, as if a total loſs had actually happened. Indeed, the word abandonment conveys the idea, that the whole property is not loſt; for it is impoſſible to cede or abandon that which does not exiſt. When the underwriter has diſcharged his inſurance, and the abandonment is made, he ſtands in the place of the inſured, and is entitled to all the advantages reſulting from that ſituation.

Chap. 4. p. 82. Pothier's Traité du contrat. d' Aſſurance 133.

Vide c. 6. p. 98.

See Randall v. Cockran, 2 Vez. 98. ante, § 8. p. 142.

From what has been ſaid then, it appears that abandonment dates its origin from the period at which the contract of inſurance was itſelf introduced; becauſe inſurance being a contract of indemnity, the inſured can recover no more than the amount of the loſs actually ſuſtained: but if he were allowed to recover for a total loſs, and might alſo retain the property ſaved, he would be a conſiderable gainer, which the law will not allow. Accordingly we find, that the doctrine of abandonment has obtained a place in the laws of all the maritime nations in the world, where inſurance has been known: and in all thoſe laws the definition of it is the ſame, namely, that when any goods or ſhips, that are inſured, happen to be loſt, taken, or ſpoiled, the inſured is obliged to abandon ſuch goods or ſhips for the benefit of the inſurers, before he can demand any

France, Rotterdam, Bilboa, Middleburgh.

any ſatisfaction from them. In this reſpect alſo, they ſeem to be agreed, that when an abandonment is made, it muſt be a total, not a partial one; that is, one part of the property inſured ſhall not be retained, and the other part abandoned; a regulation certainly founded in juſtice. Pothier 133. Ord. of Lew. 14. art. 47. Ord. of Bilboa 32.

The propriety and juſtice of abandoning in certain caſes to the inſurers being apparent, it will be proper to conſider in what caſes, and under what circumſtances, the inſured is intitled to exerciſe this power: for although in all caſes the inſured has a right to ſay, he will not abandon; yet he cannot at his pleaſure haraſs the inſurer, by ſaying he will abandon, and thereby turn that, which, in its own nature, was only a partial, into a total loſs. 2 Bur. 697.

In queſtions of this nature, the opinion of learned foreigners muſt always have weight: becauſe they are not queſtions of poſitive regulation, or municipal law: but of general and extenſive import: not confined to any particular ſtate, but founded on the great principle of reaſon, juſtice, and univerſal law. The learned *Roccus*, who has accurately examined the works of thoſe writers that went before him, and who, after ſtating their various opinions, forms his own concluſions, has not been ſilent upon this occaſion. He puts this queſtion: "Aſſecurator, qui jam ſolvit æſtimatio-"nem mercium deperditarum, ſi poſtea dictæ merces appa-"reant et recuperatæ ſint, an poſſit cogere dominum ad ac-"cipiendas illas, et ad reddendam ſibi æſtimationem, quam "dedit?" He anſwers, "Diſtingue; aut merces, vel aliqua "pars ipſarum appareant, et reſtitui poſſint, ante ſolutionem "æſtimationis, et tunc tenetur dominus mercium illas reci-"pere, et pro illâ parte mercium apparentium, liberabitur "aſſecurator, nam qui tenetur ad certam quantitatem reſpec-"tu certæ ſpeciei, dando illam, liberatur, et etiam, quia "contractus aſſecurationis eſt conditionalis, ſcilicet ſi "merces deperdantur: non autem dicuntur deperditæ, ſi "poſtea reperiantur. Verum ſi merces non appareant in "illa priſtinâ bonitate, aliter fit æſtimatio, non in totum, "ſed prout tunc valent. Aut vero poſt ſolutam æſtimationem Roccus, No. 50.

"ab

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" ab aſſecuratore compareant merces, et tunc eſt in elec-
" tione mercium aſſecurati vel recipere merces, vel retinere
" pretium."

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And although a ſubſequent paſſage in the ſame author may ſeem to contradict that juſt recited; yet when attended to, they are both perfectly conſiſtent. He ſays, " ſufficit ſemel
Roccus, No. 66. " extitiſſe conditionem ad beneficium aſſecurati de amiſſione
" navis, etiam quod poſtea ſequeretur recuperatio; nam per
" talem recuperationem non poterit præjudicari aſſecurato."

From this paſſage it may be inferred, that a total loſs having once happened, it muſt always continue ſo. But it muſt be underſtood, with reference to the context, and other parts of the work, from which it appears, that in order to entitle the inſured to recover as for a total loſs, it muſt continue total, at the time when the offer of abandonment is made, at the time of the action brought, or at the time of the payment of the money.

Chap. 7. ſ. 1. In a *French* treatiſe, called *Le Guidon*, it is ſaid, that the inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value of the thing; or if the voyage be loſt, or ſo interrupted, that the purſuit of it is not worth the freight.

Ord. Lew. 14. Ord. of Bilb. Ord. of Rot. & Magens. The ſame idea, with reſpect to the circumſtances which will juſtify an abandonment, ſeems to prevail in almoſt all the foreign ordinances.

But in no country have the principles of abandonment been more accurately defined than in *England*: and it muſt be remembered, that the deciſions, from which the following principles are ſelected, are of the greateſt authority; that they are not merely the opinions of private ſpeculative men, but the ſolemn and deliberate judgment of the grave and learned judges of the *Engliſh* courts; judgments formed after mature deliberation, and ſerious argument; eſtabliſhed upon the ſolid and permanent *baſis* of reaſon and good ſenſe.

From thoſe deciſions we may collect, that the right to abandon muſt ariſe upon the object of the inſured being ſo far defeated, that it is not worth his while to purſue it: ſuch a loſs as is equally inconvenient to him, as if it had been total. 2 Bur. 1209. For inſtance, if the voyage be abſolutely loſt, or not worth purſuing; if the ſalvage be very high, *ſuppoſe a half*; if further [146] expence be neceſſary; if the inſurer will not engage at all events to bear that expence, though it ſhould exceed the value, or fail of ſucceſs: under theſe, and many other like circumſtances, the inſured may diſentangle himſelf, and abandon, notwithſtanding there has been a recapture. Guidon, ch. 7. ſ. 1.

It is evident, that there may be circumſtances, in which it would be contrary to every principle of juſtice, to ſuffer the inſured to abandon; for a ſhip might be taken, and eſcape immediately, which would be no hindrance at all to the voyage: or ſhe might be taken and inſtantly ranſomed, which would amount only to a partial loſs; in which caſes the inſured ſhall not be allowed to demand a recompence for a total loſs. 2 Burr. 697. 1213.

It is alſo material to obſerve, that the right to abandon muſt depend upon the nature of the caſe at the time of the action brought, or at the time of the offer to abandon: a determination founded, as I have ſaid before, on the nature of the contract between the parties; becauſe an inſurer ought never to pay leſs, upon a contract of indemnity, than the value of the loſs; and the inſured ought never to gain more. Burr. 1214.

From what has been ſaid, it will appear ſufficiently evident, that the owner cannot abandon, unleſs at ſome period or other of the voyage there has been a total loſs: and therefore, if neither the thing inſured, nor the voyage be loſt, and the damage ſuſtained ſhall be found, upon computation, not to amount to a moiety of the value, the owner ſhall not be allowed to abandon. 1 Term Rep. P. 191.

Theſe principles are fully illuſtrated and confirmed by the judgments given in the following caſes.

The

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Pringle v. Hartley, in Chancery, 1744. 3 Atk. 195.

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The defendant had inſured the ſhip *Succeſs* from *London* to *Bermudas*, and ſo to *Carolina*; the ſhip was taken by a *Spaniſh* privateer, and afterwards retaken by an *Engliſh* privateer, and carried into *Boſton* in *New England*, where, no perſon appearing to give ſecurity, or to anſwer the moiety, the recaptors were entitled to for ſalvage, ſhe was condemned, and ſold in the court of Admiralty there; the recaptors had their moiety, and the overplus money remained in the hands of the officers of that court. An action upon the policy was brought at law by the defendant here, who obtained a verdict againſt the now plaintiff.

The plaintiff brought a bill, ſuggeſting the capture to be fraudulent, and done deſignedly by the captain; and now moved for an injunction to ſtay the proceedings at law.

It was contended for the plaintiff, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loſs, as the act of the 13 *Geo.* 2. *c.* 4. *ſ.* 18. gives the thing ſaved to the owner, and he is entitled to receive it from the officers of the Admiralty: and that the plaintiff ought to be obliged to pay no more than the loſs actually ſuſtained, which cannot be aſcertained till after the defendant ſhall have received the part, that might have come to him upon the ſalvage.

The defendant in his anſwer had ſworn, that he had offered, and was now willing to relinquiſh his intereſt to the plaintiffs in the benefit of the ſalvage, and would give them a letter of attorney for that purpoſe to receive it.

Lord Chancellor *Hardwicke*.—"There is no ground for an injunction in this caſe, here there was an agreement to go to trial in one of theſe actions which had been brought, and to be bound by the event of that: at the time of the trial, they knew that the ſhip was retaken, and the manner of the capture.

"The *quantum* of the damage and loſs ſuſtained is the only thing now to be diſputed; for it is impoſſible to carry on trade

trade without inſuring, eſpecially in time of war, Therefore regard muſt be had to the inſured, as well as to the inſurer; and where there is no admiſſion in the anſwer of any kind of fraud, though various pretences of that ſort may be ſet up by the bill, they are not to be regarded. The queſtion then ariſes on the ſtatute of 13 *Geo.* 2. with regard to the ſalvage.

" It has been ſaid, there ought to be only half the loſs recovered on the policy; and as to that, the act has made great alteration in the law of nations, with reſpect to recaptures.

" The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the perſon retaking it, as if it had been originally the ſhip of the enemy: but by the act the recaption is the reveſting of the property of the owner. If there is a ſalvage, that muſt be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it. The ſhip was condemned and ſold, becauſe the money was not paid, or ſecured to be paid by the owners. [148]

" It is uncertain, whether the defendant will receive any thing or not: and if any thing be recovered, he muſt have an allowance for his expences in recovering.

" Therefore I take it, when he is willing to relinquiſh his intereſt in the ſalvage, he ought to recover the whole money inſured. It would be miſchievous if it were otherwiſe, for then upon a recapture a man would be in a worſe ſituation than if the ſhip were totally loſt." Injunction was denied.

But the firſt caſe to be found in our books, in which the doctrine of abandonment was fully gone into, in which its principles were ſettled, and applied to the particular circumſtances then before the court, was the caſe of *Goſs* and another againſt *Withers*.

It

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Goſs and another v. Withers, 2 Burr. 683.

It was a ſpecial caſe from the ſittings in *London*, upon two actions, on two diſtinct policies of inſurance; one upon a ſhip, and the other upon the loading.

The former was an inſurance on the *David* and *Rebecca*, at and from *Newfoundland* to her port of diſcharge in *Portugal* or *Spain*, without the *Streights*, or *England*, to commence from the time of her beginning to load at *Newfoundland*, for either of the above named places; and to continue till ſhe ſhould be arrived at her ſaid port of diſcharge, and there moored 24 hours at anchor in ſafety. The ſhip was, by agreement, to be valued at the ſum ſubſcribed, without further account. The inſurance was to be at ten guineas *per cent.*: and in caſe of loſs to abate two *per cent.*: and in caſe of average loſs not exceeding 5 *l. per cent.* to allow nothing
[149] towards ſuch loſs. And if the veſſel was diſcharged without the *Streights*, excepting the *Bay of Biſcay*, two guineas *per cent.* were to be returned: and if ſhe failed with convoy and arrived, two guineas more *per cent.* were to be returned. The plaintiffs declared upon a total loſs, by capture by the *French*.

The policy, declared upon in the other action, was an inſurance upon any kinds of lawful goods and merchandizes, loaden or to be loaden on board the aforeſaid ſhip; and this policy for 7 *l.* 7 *s.* inſured 70 *l.* The declaration alledged, that divers quantities of fiſh and other lawful merchandizes, to the value of the money inſured, were put on board, to be carried from *Newfoundland* to her port of deſtination, and ſo continued (except ſuch as were thrown overboard as is after mentioned) till the loſs of the ſhip and goods. The declaration then avers, that a part of the ſaid goods were neceſſarily thrown overboard in a ſtorm, to preſerve the ſhip, and the reſt of the cargo; after which jetſon, the ſhip, and the remainder of the goods, were taken by the *French*.

The caſe ſtates, that the ſhip departed from her proper port, and was taken by the *French* on the 23d of *December*, 1756: and that the maſter, mates, and all the ſailors, except

cept an apprentice and landman, were taken out and carried to *France*. That the ſhip remained in the hands of the enemy *eight days*, and was then retaken by a *Britiſh* privateer, and brought in on the 18th of *January* to *Milford-Haven*, and that immediate notice was given by the inſured to the inſurer, with an offer to abandon the ſhip to their care. It was alſo proved at the trial, that before the taking by the enemy, a violent ſtorm aroſe at ſea, which firſt ſeparated the ſhip from her convoy, and afterwards diſabled her ſo far as to render her incapable of proceeding on her deſtined voyage, without going into port to refit. It was alſo proved, that part of the cargo was thrown overboard in the ſtorm: and the reſt of it was ſpoiled while the ſhip lay at *Milford-Haven*, after the offer to abandon, and before ſhe could be refitted: and the inſured proved their intereſt in the ſhip and cargo, to the value inſured.

Several queſtions ariſing upon the trial of the firſt of theſe cauſes it was agreed, that the jury ſhould bring in their verdict, in both cauſes, for the plaintiffs, as for a total loſs; ſubject, however, to the opinion of the court on the following queſtions, *viz.* [150]

1ſt. Whether this capture of the ſhip by the enemy, was or was not ſuch a loſs, as that the inſurers became liable thereby?

2dly. Whether, under the ſeveral circumſtances of this caſe, the inſured had or had not a right to abandon the ſhip to the inſurers, after ſhe was carried into *Milford-Haven*?

After two arguments, the court decided unanimouſly in favour of the plaintiffs; and in the opinion then delivered by Lord *Mansfield*, all the law upon this ſubject was fully diſcuſſed. It will not be neceſſary, however, to ſtate in this place what fell from his lordſhip upon the firſt of theſe queſtions, thus ſubmitted to the opinion of the court; becauſe that was very copiouſly treated of in a former chapter, in which it was ſhewn, that whether property was or was not transferred Vide ante, c. 4. p. 66. 69.

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to the enemy by a capture, and abſolutely loſt to the original owner, it could no way affect the contract entered into between an inſurer and inſured. It will be ſufficient then to follow his lordſhip in the ſecond part of his argument.

Lord *Mansfield*.—"The ſingle queſtion, therefore, upon which this caſe turns, is, whether the inſured had, under all the circumſtances, an election to abandon, on the 18th of *January* 1757? The loſs and diſability were in their nature total, at the time they happened. During eight days, the plaintiff was certainly entitled to be paid by the inſurer, as for a total loſs; and in caſe of a recapture, the inſurer would have ſtood in his place. The ſubſequent recapture is, at beſt, a ſaving only of a ſmall part: *half the value muſt be paid for ſalvage.* The diſability to purſue the voyage ſtill continued. The maſter and mariners were priſoners. The charter party was diſſolved. The freight (except in proportion to the goods ſaved) was loſt. The ſhip was neceſſarily brought into an *Engliſh* port. What could be ſaved, might not be worth the expence neceſſarily attending it; which is proved by the plaintiff's offer to abandon. The ſubſequent title to reſtitution, ariſing from the recapture, at a great expence, the ſhip too being diſabled from purſuing her voyage, cannot take away a right veſted in the inſured at the time of the capture. But becauſe he cannot recover more than he has ſuffered, he muſt abandon what may be ſaved. I cannot find a ſingle book, ancient or modern, which does not ſay, that in caſe of a ſhip being taken, the inſured may demand as for a total loſs, and abandon. What proves the propoſition moſt ſtrongly is, that by the general law, he may abandon in the caſe merely of an arreſt, or an embargo, by a prince not an enemy. Poſitive regulations in different countries have fixed a preciſe time before the inſured ſhould be at liberty to abandon in that caſe. The fixing a preciſe time proves the general principle. Every argument holds ſtronger in the caſe of the other policy with regard to the goods. The cargo was in its nature periſhable, deſtined from *Newfoundland* to *Spain* or *Portugal*: and the voyage was as abſolutely defeated, as if the ſhip had been wrecked, and a third or fourth of the goods ſaved.

Vide the ſtat. 13 Geo. II. c. 4. ſ. 18. now altered by 33 Geo. III. c. 66. ſ. 42.

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Vide ante, c. 4. p. 78.

"No

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"No capture by the enemy can be ſo total a loſs, as to leave no poſſibility of a recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by the late act of parliament, if an *Engliſh* ſhip retake at any time, before condemnation or after, the owner is entitled to reſtitution upon ſtated ſalvage. This chance does not ſuſpend the demand, for a total loſs, upon the inſurer: but juſtice is done, by putting him in the place of the inſured, in caſe of a recapture. In queſtions upon policies, the nature of the contract, as an indemnity, and nothing elſe, is always liberally conſidered. There might be circumſtances, under which a capture would be but a ſmall temporary hindrance to the voyage; perhaps none at all: as if a ſhip were taken, and, in a day or two, eſcaped entire, and purſued her voyage. There are circumſtances, under which it would be deemed an average loſs: if a ſhip taken be immediately ranſomed, and purſue her voyage, there the money paid is an average loſs. And in all caſes, the inſured may chuſe not to abandon. In the ſecond part of the "Uſages and Cuſtoms of the Sea," (a *French* book tranſlated into *Engliſh*) a treatiſe is inſerted called Le Guidon, in which, after mentioning the right to abandon upon a capture, he adds, "or any other ſuch diſturbance as defeats the voyage; or makes it not worth while, or worth the freight to purſue it;" I know that in late times the privilege of abandoning has been reſtrained, for fear of letting in frauds; and the merchant cannot elect to turn that, which, at the time it happened, was in its nature but a partial, into a total loſs, by abandoning. But there is no danger of fraud in the preſent caſe. The loſs was total at the time it happened: it continued total, as to the deſtruction of the voyage. A recovery of any thing could only be had, by paying more than half the value, including the coſts. What could be ſaved of the goods, might not be worth the freight for ſo much of the voyage as they had gone, when they were taken. The cargo, from its nature, muſt have been ſold, where it was brought in. The loſs, as to the ſhip, could not be eſtimated; nor the ſalvage of half be fixed, by a better meaſure than a ſale. In ſuch a caſe, there is no colour to ſay, that the inſured might not diſentangle himſelf from unprofitable trouble and further expence, and leave the

Vide ante, p. 145.

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inſurer to ſave what he could. It might as reaſonably be argued, that if a ſhip ſunk were weighed up again at great expence, the crew having periſhed, the inſured could not abandon, nor the inſurer be liable, becauſe the body of the ſhip was ſaved. We are therefore of opinion, that the loſs was total by the capture, and the right which the owner had, after the voyage was defeated, to obtain reſtitution of the ſhip and cargo, paying great ſalvage to the recaptor, might be abandoned to the inſurers, after ſhe was brought into *Milford Haven*."

The principles laid down in this caſe have been ſtrictly adhered to in all ſimilar caſes; and particularly in a modern one, which it will be proper to mention in this place, before we come to the great cauſe of *Hamilton* againſt *Mendes*, in which ſome other principles relative to this ſubject were eſtabliſhed.

Milles v. Fletcher, Douglas 219.

It was an action on a policy of inſurance, on the ſhip the *Hope* and her freight, from *Montſerrat* to *London*. The plaintiff went for a total loſs: the defendant inſiſted, that he was only entitled to recover for an average loſs. The jury found a verdict for a total loſs; and upon a motion for a new trial,

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the facts of the caſe appeared to be as follows: the ſhip, when proceeding on her voyage, was captured on the 23d of *May*, by two *American* privateers, who took the captain and all the crew, and part of the cargo, which conſiſted of ſugars, out of her. The rigging was alſo taken away. She was afterwards retaken, and carried into *New York*, where the captain arrived on the 23d of *June*, and, taking poſſeſſion of her, found that part of what had been left of the cargo was waſhed overboard, that fifty-ſeven hogſheads of what remained were damaged, and that the ſhip was leaky, and in ſuch a ſtate, that ſhe could not be repaired without unloading her entirely. The owners had no ſtorehouſes at *New-York*, in which the ſugars could have been put, while the ſhip was repairing, nor any agent there to adviſe or direct the captain. No ſailors were to be had. The only method he had of paying the ſalvage, *which amounted to the value of forty hogſheads of ſugar*, was by ſale of part

part of the cargo, or the ſhip. The captain did not know of the inſurance. If he had repaired the ſhip, his expences would have exceeded the freight more than 100*l.* There was an embargo on all veſſels at *New York* till the 27th of *December*; and by the deſtination of his ſhip, ſhe was to have arrived at *London* in *July*. Under theſe circumſtances, he conſulted with his friends at *New-York*, and reſolved upon their opinion and his own, to ſell the ſhip and cargo, as the moſt prudent ſtep for the intereſt of his employers. The cargo was accordingly ſold and paid for. The ſhip was alſo contracted for, but the perſon who had agreed to buy her, ran away, and the captain left her in a creek near *New York*, and returned to *England*, where he arrived in the *February* following, and gave the plaintiff notice of what had been done, which was the firſt information he received of it, and the plaintiff immediately claimed as for a total loſs from the underwriters, and offered to abandon. Lord *Mansfield* told the jury, that if they were ſatisfied the captain had done what was beſt for the benefit of all concerned, they muſt find as for a total loſs, which they accordingly did.

Upon the motion for a new trial, the unanimous opinion of the court was delivered by

Lord *Mansfield*.—"The great object in every branch of the law, but eſpecially in mercantile law, is certainty, and that the grounds of deciſion ſhould be preciſely known. I took great pains in delivering the opinion of the court in the caſes of *Goſs* v. *Withers*, and *Hamilton* v. *Mendes*. I read both thoſe caſes over laſt night, and I think that from them, the whole law between inſurers and inſured, as to the conſequences of capture and recapture, may be collected. Wherever a queſtion of law ariſes at *niſi prius*, I propoſe a caſe, or grant one, when aſked for by the counſel, and I avoid as much as poſſible blending fact and law together, having ſeen the inconvenience of it in *Pole* v. *Fitzgerald*. But on the trial of this cauſe, it did not appear to me, that there was any queſtion of law, and no caſe was aſked for. It was impoſſible to aſk for one, till the facts were aſcertained; and when they were, it

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Vide poſt.

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would have been impoſſible to ſtate them in any way, which could have left a doubt on the law. It was not contended, that a capture *neceſſarily* amounts to a total loſs between inſurer and inſured; nor, on the other hand, that on a capture and recapture, there may not be a total loſs, though there remain ſome material tangible part of the ſhip and cargo. Neither was it contended, that the captain has an arbitrary power, by his act, to make the loſs, either partial or total, as he pleaſes. A great deal has been ſaid about what the admiralty could, or would have done, in ſuch a caſe, in order to pay the ſalvage. As to that, if no owner appeared, they would condemn the whole; but if they ſaw, from the ſhip's papers, that there was one, they would not. If there were different claimants of the ſhip and cargo, they would leave it to them to ſay, what part ſhould be ſold, and if they differed in opinion, would order the ſale of ſuch part as would be attended with the ſmalleſt loſs. But all *that* is foreign to the preſent queſtion, which is ſingly this, whether the conſequences of the capture were ſuch as, notwithſtanding the recapture, occaſioned a total obſtruction of the voyage, or only a partial one, as in the caſe of *Hamilton* v. *Mendes*. In that caſe, and in *Goſs* v. *Withers*, great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured had notice, at the time of the offer to abandon, and at the time when the action was brought. No caſes ſay, that the bare exiſtence of the hull of the ſhip prevents the

[155] loſs being total. The rule is laid down, "that if the voyage "be loſt, or not worth purſuing, if the ſalvage be high, if "farther expence be neceſſary, if the inſurer will not at all "events undertake to pay that expence, *&c.* the inſured may "abandon, notwithſtanding a recapture." Here, at the time of the capture there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew were taken out, and part of the cargo; and the rigging alſo taken away. Afterwards the ſhip was retaken, and carried into *New York*. When ſhe was brought there, it ſtill continued a total loſs. Neither the inſurers, nor the inſured, had any agent in the place. The court of Admiralty muſt have proceeded *ſecundum æquum et bonum*, and might have ſold her for the benefit of thoſe concerned. When the inſured firſt had notice, and offered to abandon,

abandon, (which was when the captain came to *England*), and when the action was brought, it was ſtill a total loſs. The voyage was abandoned, the cargo ſold, and the ſhip left to be ſold. The only anſwer the defendant makes, or can make to this is, that the loſs was total indeed; but that the captain made it ſo, by his improper conduct; for that on his taking poſſeſſion of the ſhip, the loſs became partial, and that he ought to have purſued the voyage. But is this defence true in fact? The captain, when he came to *New York*, had no expreſs order; but he had an implied authority, from both ſides, to do what was fit and right to be done, as none of them had agents in the place: and whatever it was right for him to have done, if it had been his own ſhip and cargo, the underwriter muſt anſwer for the conſequences of, becauſe this is within his contract of indemnity. Suppoſe there had been no inſurance, what ought the captain to have done? 1ſt, As to the cargo, according to the courſe of the voyage, the ſhip ſhould have arrived at *London* in *July*. On the capture, part had been taken out, ſome was waſhed overboard, 57 hogſheads were damaged, and the whole, from the leaking of the veſſel, was in a periſhable ſtate. There were no ſtorehouſes; nor could the ſhip proceed in the ſtate ſhe was in. The crew were gone, and an embargo was laid on till *December*. What, ſhall a cargo, which was intended to arrive at *London* in *July*, be kept in a periſhable ſtate at *New York*, in a leaky veſſel, till *December*? 2dly, As to the ſhip, it was certainly better to ſell her, than to bring her to *London*. There was no crew belonging to her; [156] and ſhe had no cargo. Even if all the cargo had been left, the expences of repairs would have exceeded the freight. If ſhe had been brought home, the expence of bringing her might have been more than what ſhe would have ſold for in *London*. It has been ſaid, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy; for that circumſtance goes to determine it to be the intereſt of the inſured to abandon the voyage. The point is, what did the owner ſuffer by the capture; and it appears that he ſuffered ſo much, that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn

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of the ſcale to one ſide or the other. I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found "*that it was*" in words, where would have been the queſtion of law?"

The court therefore diſcharged the rule for a new trial.

It was neceſſary to be very particular in ſtating this caſe from the work of ſuch an accurate reporter as Mr. *Douglas*, for two reaſons: 1ſt, Becauſe it is a determination, exactly conformable to that of *Goſs* v. *Withers*, recognizing and confirming the principles there laid down; and 2dly, To relieve the court from the obſervations made, on account of the above deciſion.

Weſkett on Inſurance, p. 4.

A caſe has appeared in print, under the name of *Milles v. Hayley*, upon the ſame policy, the ſame ſhip, and ſame voyage: but the author of the work, in which it appears, could not poſſibly have been preſent at the trial; and the facts muſt have been miſtated to him: or if preſent, he has not taken down the evidence with ſufficient accuracy. For he has not ſtated, that on the capture, part of the cargo, and alſo the rigging, were taken away: that part of what had been left of the cargo was waſhed overboard: that 57 hogſheads of the ſugar that remained, were damaged: that the ſhip was leaky, and in ſuch a ſtate, that ſhe could not be repaired without unloading her entirely: that the ſalvage amounted to the value of 40 hogſheads of ſugar: that the repairs would have exceeded the freight by more than 100*l.*: and that the embargo was to continue till the 27th of *December*: whereas the ſhip ought to have arrived at *London* in the *July* preceding: all which circumſtances are to be found in Mr. *Douglas*'s report: all of them are material to the deciſion of the cauſe, and upon all of them much ſtreſs is laid by Lord *Mansfield*, in delivering the judgment of the court. It was thought proper to note theſe differences; as nothing is ſo neceſſary in all caſes, more eſpecially in thoſe of inſurance, as the accurate and preciſe ſtatement of circumſtances.

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But although the doctrine advanced in *Goſs* againſt *Withers*, was ſo very general and comprehenſive; yet it certainly is not

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to be conſidered, as precluding the poſſibility of an exception to the generality of the principle there eſtabliſhed. CHAP. IX.

Indeed, from the whole tenour of the Chief Juſtice's very learned argument upon that occaſion, it is apparent, that he had at that very time an exception in his view: and from ſome of the words he then uſed, it would almoſt induce one to ſuppoſe, that his lordſhip had foreſeen the very caſe, which actually came to be decided within a few years afterwards.

Hamilton v. Mendes, 2 Burr. 1198. and 1 Black. 276.

It was a ſpecial caſe reſerved at *Guildhall*, at the ſittings there before Lord *Mansfield*, after *Michaelmas* term 1760, in an action brought againſt the defendant, as one of the inſurers, upon a policy of inſurance from *Virginia* or *Maryland* to *London*, of a ſhip called the *Selby*, and of goods and merchandize therein, until ſhe ſhall have moored at anchor 24 hours in good ſafety. The caſe ſtated for the opinion of the Court was as follows:

That the ſhip *Selby*, mentioned in the policy, being valued at 1,200*l.*; and the plaintiff having intereſt therein, cauſed the policy in queſtion to be made; and the ſame was accordingly made, in the name of *John Mackintoſh*, on behalf and for the uſe and benefit of the plaintiff, and was ſubſcribed by the defendant, as ſtated, for 100*l.* That the ſhip was in good ſafety at *Virginia*, where ſhe took on board 192 hogſheads of tobacco, to be delivered at *London*. That on the 28th day of *March*, ſhe departed, and ſet ſail from *Virginia* for *London*; and on the 6th day of *May* following, as ſhe was ſailing and proceeding in her ſaid voyage, was taken by a *French* privateer called the *Aurora* of *Bayonne*. That at the time of the capture, the *Selby* had nine men on board; and the captain of the ſaid privateer took out ſix, beſides the captain, leaving only the mate and one man on board. That the *French* put a prize-maſter and ſeveral men on board the ſhip *Selby*, to carry her to *France*. That as the *French* were carrying her towards *France*, on the 23d day of the ſaid *May*, ſhe was retaken off *Bayonne*, by an *Engliſh* man of war; and accordingly ſent into *Plymouth*, where ſhe arrived the 6th day of *June* following. That the plaintiff,

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plaintiff, living at *Hull*, as ſoon as he was informed what had befallen his ſhip, the *Selby*, wrote a letter on the 23d of *June* to his agent *John Mackintoſh*, living in *London*, to acquaint the defendant, "that the plaintiff did from thence abandon to him "his intereſt in the ſaid ſhip, as to the ſaid 100*l.* by the defen- "dant inſured." That the ſaid *I. M.* on the 26th of *June*, acquainted the defendant with the offer to abandon the ſhip; to which the defendant anſwered, "that he did not think himſelf "bound to take to the ſhip; but was ready to pay the ſalvage, "and all other loſſes and charges that the plaintiff ſuſtained by "the capture." That upon the 19th day of *Auguſt*, the ſhip *Selby* was brought into the port of *London*, by the order of the owners of the cargo, and the recaptors: that the ſhip *Selby* ſuſtained no damage from the capture. That the whole cargo of the ſaid ſhip was delivered to the freighters, at the port of *London*, who paid the freight to *Benjamin Vaughan*, without prejudice. The queſtion, therefore, ſubmitted to the opinion of the court is, Whether the plaintiff, on the ſaid 26th day of *June*, had a right to abandon, and has a right to recover, as for a total loſs?

After two arguments at the bar upon this queſtion, and after the court had taken time to deliberate upon it, their unanimous reſolution was delivered by the Chief Juſtice.

Lord *Mansfield*.—"The plaintiff has averred in his declaration, as the baſis of his demand for a total loſs, "that by the "capture, the ſhip became wholly loſt to him." The general queſtion is, Whether the plaintiff, who, at the time of his action brought, at the time of his offer to abandon, and at the time of his being firſt apprized of any accident having happened, had only, in truth, ſuſtained a partial loſs, ought to recover for a total one? In ſupport of the affirmative, the counſel for the plaintiff inſiſted on the four following points: 1ſt, That by this capture, the property was changed; and therefore, the loſs total for ever. 2dly, If the property were not changed, yet the capture was a total loſs. 3dly, That when the ſhip was brought into *Plymouth*, particularly on the 26th day of *June*, the recovery was not ſuch as, in truth, changed the totality

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tality of the loſs into an average. 4thly, Suppoſing it did, yet, the loſs having once been total, a right veſted in the inſured to recover the whole upon abandoning; of which right he could never be diveſted by any ſubſequent event.

"As to the firſt point. If the change of property were at all material between the inſurer and inſured, it would not be applicable to this caſe; becauſe by the marine law of *England*, there is no change of property, in caſe of a capture, before condemnation; and now by the act of parliament, the *jus poſtliminii* continues for ever. I know many writers argue, between the inſurer and the inſured, from the diſtinction, whether the property was or was not changed by the capture, ſo as to transfer a complete right from the enemy to a recaptor, or neutral vendee, againſt the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor, or a vendee, ought never to be the rule of deciſion, as between the inſurer and inſured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counſel for the plaintiff, upon this ſecond point, that by this capture, while it continued, the ſhip was totally loſt, though it be admitted, that the property, in the caſe of a recapture, never was changed, but returned to the former owner. 29 Geo. II. c 34. ſ. 24.

"The third point depends, as every queſtion of this kind muſt, upon the particular circumſtances. It does not neceſſarily follow that, becauſe there is a recapture, therefore the loſs ceaſes to be total. If the voyage be ſo defeated, as not to be worth the further purſuit; if the ſalvage be high, and the other expences great; or if the underwriter refuſe to bear theſe expences; the inſured may abandon. But in the preſent caſe, the voyage was ſo far from being loſt, that it had only met with a ſhort temporary obſtruction; the ſhip and cargo were both entirely ſafe; the expence incurred did not amount to near half the value; and upon the 26th of *June*, when the ſhip was at *Plymouth*, and the offer was made to abandon, the inſurer undertook to pay all charges and expences, to which the plaintiff might be put by the captuse. The only argument to ſhew that the loſs had not [160]

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then ceaſed to be total, was built upon a miſtaken ſuppoſition, that the recaptor had a right to demand a ſale, and to put a ſtop to any further proſecution of the voyage. But that is not ſo. The property returned to the plaintiff, pledged to the recaptors for one-eighth of the value, as ſalvage for retaking and bringing the ſhip into an *Engliſh* port. Upon paying this, the owner was entitled to reſtitution. The recaptor had no right to ſell the ſhip. If they differed about the value, the Court of Admiralty would have ordered a commiſſion of appraiſement. In this caſe, it was the intereſt of the owner of the ſhip, the owners of the cargo, and the recaptors, that ſhe ſhould forthwith proceed upon her voyage from *Plymouth* to *London*. But had the recaptor oppoſed it, or affected delay, the court of Admiralty would have made an order for bringing her immediately to *London*, her port of delivery, upon reaſonable terms. Therefore it is moſt clear, that upon the 26th day of *June*, the ſhip had ſuſtained no other loſs, by reaſon of the capture, than a ſhort temporary obſtruction, and a charge which the defendant had offered to pay and ſatisfy. This brings the whole to the fourth and laſt point.

"The plaintiff's demand is for an indemnity. This action then muſt be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loſs, when the final event has decided, that the damnification, in truth, is an average, or perhaps no loſs at all. Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity, in the ſame degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been ſuſtained. This reaſon is ſo much founded in ſenſe, and the nature of the thing, that the common law of *England* adopts it, though inclined to ſtrictneſs. The tenant is obliged to indemnify his lord from waſte; but if the tenant do, or ſuffer waſte to be done in houſes, yet if he repair before any action brought, there lies no action of waſte againſt him. He cannot however plead "*non fecit vaſtum*;" but the ſpecial matter. The ſpecial matter ſhews, that the injury being repaired before the action

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Co. Litt. 53 a.

action brought, the plaintiff had no cauſe of action: and whatever takes away the cauſe, takes away the action. Suppoſe a ſurety ſued to judgment; and afterwards, before an action is brought, the principal pays the debt and coſts, and procures ſatisfaction to be acknowledged upon record: the ſurety can have no action for an indemnity, becauſe he is indemnified before any action is brought. If the demand or cauſe of action does not ſubſiſt, at the time the action is brought, the having exiſted at any former time can be of no avail. But in the preſent caſe, the notion of a veſted right in the plaintiff to ſue as for a total loſs, before the recapture, is fictitious only, and not founded in truth. For the inſured is not obliged to abandon, in any caſe; he has an election. No right can veſt as for a total loſs, till he has made that election: he cannot elect, before advice is received of the loſs; and if that advice ſhew the peril to be over, and the thing in ſafety, he cannot elect at all, becauſe he has no right to abandon when the thing is ſafe. Writers upon maritime law are apt to embarraſs general principles with the poſitive regulations of their own country: but they all ſeem to agree, that if the thing be recovered before the money is paid, the inſured can only be entitled according to the final event." His lordſhip here cited the paſſage from *Roccus*, which we have already ſeen at the beginning of this chapter, and then proceeded thus:

Roccus Not. 50.

"In the caſe of *Spencer* v. *Franco*, though upon a wager policy, the loſs was held not to be total, after the return of the ſhip *Prince Frederick* in ſafety; though ſhe had been ſeized and long kept by the king of *Spain*, in a time of actual war. In the caſe of *Pole* v. *Fitzgerald*, though upon a wager policy, the majority of the judges and the houſe of lords held there was no total loſs, the ſhip having been reſtored before the expiration of the four months, the time for which ſhe was inſured.

Vide ante, c. 4. p. 75.

Vide poſt, 170.

"The preſent attempt is the firſt that ever was made, to charge the inſurer as for a total loſs, upon an intereſt policy, after the thing was recovered: and it is ſaid, the judgment in the caſe of *Goſs* v. *Withers* gave riſe to it. It is admitted, that that caſe was no way ſimilar. Before that action was brought, the whole ſhip

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ſhip and cargo were literally loſt; at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely loſt; the remainder of the cargo was fiſh periſhing, and of no value at *Milford Haven*, where the ſhip was brought in; the ſhip ſo ſhattered, as to want great and expenſive repairs; the ſalvage was one half, and the inſurer did not engage to be at any expence; it did not appear that it was worth while to try to ſave any thing: and the recaptor, though entitled to one half, as well as the owner of the ſhip and cargo, left the whole to periſh, rather than be at any further trouble or expence. But it is ſaid, though the caſe was entirely different, ſome part of the reaſoning warranted the propoſition now inferred by the plaintiff from it. The great principle relied upon was, "that as between the inſurer and inſured, the contract being an indemnity, the truth of the fact, ought to be "regarded; and therefore there might be a total loſs by a capture, which could not operate as a change of property; and "a recapture ſhould not relate by fiction (like the *Roman jus "poſtliminii*) as if the capture had never happened, unleſs the "loſs was in truth recovered." This reaſoning proved *è converſo*, that if the thing in truth were ſafe, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The words quoted at the bar were certainly uſed, "that there is no book, ancient "or modern, which does not ſay, that in caſe of the ſhip "being taken, the inſured may demand for a total loſs, and "abandon." But the propoſition was applied to the ſubject matter, and is certainly true, provided the capture, or the total loſs occaſioned thereby, continue to the time of abandoning, and bringing the action. The caſe then before the court did not make it neceſſary to ſpecify all the reſtrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was ſaid, to prevent any inference being drawn beyond the caſe then determined."

Vide ante, p. 150.

His lordſhip, having read a great part of his former argument in that caſe, went on in this way:

"From this mode of reaſoning, it did by no means follow, that if the ſhip and cargo had, by the recapture, been brought ſafe

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ſafely to the port of delivery, without having ſuſtained any damage at all, that the inſured might abandon. But, without dwelling longer upon principles or authorities, the conſequences of the preſent queſtion are deciſive. It is impoſſible that any man ſhould deſire to abandon in a caſe circumſtanced like the preſent, but for one of two reaſons, namely, either becauſe he has over-valued, or becauſe the market has fallen below the original price. The only reaſons, that can make it the intereſt of the party to deſire, are concluſive againſt allowing it. It is unjuſt to turn the fall of the market upon the inſurer, who has no concern in it, and could never gain by the riſe. And an over valuation is contrary to the general policy of the marine law; contrary to the ſpirit of the act of 19 *Geo.* 2. a temptation to fraud, and a great abuſe: therefore no man ſhould be allowed to avail himſelf of having overvalued. If the valuation be true, the plaintiff is indemnified, by being paid the charge he was put to by the capture. If he has overvalued, he will be a gainer, if he be permitted to abandon: and he can only deſire it, becauſe he has over-valued. This was avowed upon the firſt argument: and that very reaſon is concluſive againſt its being allowed. The inſurer, by the marine law, ought never to pay leſs, upon a contract of indemnity, than the value of the loſs: and the inſured ought never to gain more. Therefore, if there were occaſion to reſort to that argument, the conſequence of the determination would alone be ſufficient upon the preſent occaſion. But upon principles, this action could not be maintained as for a total loſs, if the queſtion were to be judged by the ſtricteſt rules of common law: much leſs can it be ſupported for a total loſs, as the queſtion ought to be decided, by the large principles of the marine law, according to the ſubſtantial intent of the contract, and the real truth of the caſe. If the queſtion is to depend upon the fact, every man can judge of the nature of the loſs, before the money is paid. But if it is to depend upon ſpeculative refinements, from the law of nations, or the *Roman jus poſtliminii* concerning the change or reveſting of property, no wonder that merchants are in the dark, when doctors have differed upon the ſubject, from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determination, I deſire it may be underſtood, that

the

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the point here determined is, "that the plaintiff, upon a policy, can only recover an indemnity, according to the nature of his case at the time of the action brought, or (at most) at the time of his offer to abandon." We give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon, and the action brought; or between the commencement of the action, and the verdict. And particularly I desire, that no inference may be drawn, "that in case the ship or goods should be restored after the money paid as for a total loss, the insurer "could compel the insured to refund the money, and to take "the ship or goods;" that case is totally different from the present, and depends, throughout, upon different reasons and principles. Here the event had fixed the loss to be an average only, before the action brought; before the offer to abandon; and before the plaintiff had notice of any accident; consequently before he could make an election. We are therefore of opinion, that he cannot recover for a total, but for a partial loss only; the quantity of which has been estimated by the jury at ten pounds *per cent.*"

But although the court did not chuse unnecessarily to decide, whether, after payment as for a total loss, the underwriter could oblige the insured to refund, if it should afterwards prove to be but partial: yet in the year 1766 this very question came before them. It arose in the case of *Da Costa* v. *Firth*, which was cited at large in a preceding chapter; and the court held, that as there was a solemn abandonment, and the money was paid, and as there was also an agreement that the insurers should be content with such salvage as the sum insured bore to the whole interest, the insured should not be obliged to refund, but the insurer should stand in his place for the salvage.

Da Costa v. Firth, 4 Burr. 1966. Vide ante, p. 6, Part 18.

It has been already said, and from the preceding cases it seems to be a necessary inference, that in order to entitle the owner to abandon, there must, at some period or other of the voyage, have been a total loss; for he cannot be allowed to turn a partial into a total loss. There was, however, a modern

modern caſe, in which this was the ſingle point to be determined. CHAP. LX.

It was an action on a policy of inſurance upon the ſhip *Friendſhip*, from *Wyburgh* to *Lynn*, ſubſcribed by the defendant for 100*l.* at two guineas *per cent.* The defendant pleaded a tender, and paid 48*l.* into court. The cauſe was tried at *Guildhall*, before Mr. Juſtice *Buller*, when a caſe was reſerved for the opinion of the court, ſtating that the *damages ſuſtained by the ſhip in the voyage inſured, did not exceed* 48*l. per cent.* which ſum the defendant had paid into court, upon pleading in the action. That when the ſhip arrived at the port of *Lynn*, ſhe was not worth repairing. The queſtion for the opinion of the court was, whether the plaintiffs had a right to abandon. Cazalet and others v. Barbe, 1 Term Rep. p. 187. [165]

This caſe came on to be argued when Lord *Mansfield* was abſent.

Mr. Juſtice *Willes*.—"The queſtion is, whether, under theſe circumſtances, the plaintiffs had a right to abandon; or, in other words, whether they can turn a partial into a total loſs. The finding of the jury in this caſe determines the queſtion, becauſe it is expreſsly found that the damage did not exceed 48*l. per cent.* The caſe then ſtates, that the ſhip was not worth repairing, but no mention is made of what was her real worth; ſo that the remaining materials of the ſhip, if ſold, may make up the difference between 48*l.* and 100*l. per cent.* There has been no loſs either of the ſhip or of the voyage; but, being an old ſhip, ſhe ſuffered ſo much, that ſhe was not worth repairing. I cannot now determine that there was a total loſs, when the jury have already ſaid, that there was only a loſs of 48*l. per cent.* As to the caſe cited of *Bond* v. *Hunter*, this queſtion never occurred in it. The action was brought upon the homeward-bound policy; and it was ſufficient to ſay, that that policy never attached, for the ſhip had received her death's wound in her outward-bound voyage. In the caſe of *Milles* v. *Fletcher*, a total and was put to the voyage. In the other caſes, the queſtions aroſe upon loſſes which had happened during Vide ſupra, p. 152.

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ring the ſeveral voyages; here the voyage has been performed, and the ſhip is arrived; and after the jury have found that the damage ſuſtained did not amount to more than 48 *l. per cent.* the court are precluded from ſaying it is a total loſs."

Mr. Juſtice *Aſhhurſt.*—"The facts found in this caſe preclude any queſtion, whether this can be conſtrued to be a total loſs. If the inſurers ſhould be held liable here, it would be making them inſure the goodneſs of the ſhip; and if the owners can
[166] recover as for a total loſs in this caſe, they might equally have recovered on account of the bad conditon of the veſſel, though ſhe had not received much damage at ſea. It is not ſtated that the ſhip received her death's wound in the courſe of her voyage. When ſhe came into port it was found ſhe was not worth repairing; but *non conſtat* if ſhe had not received any damage during the voyage, ſhe would have been worth repairing. And though the veſſel was not in a ſound ſtate, yet ſhe had arrived in ſafety twenty-four hours; and the jury having exactly defined what degree of damage ſhe had ſuſtained, we cannot ſay that the plaintiff ought to recover any more."

Mr. Juſtice *Buller.*—"Nothing can be better eſtabliſhed than that the owner of a ſhip can only abandon in caſe of a total loſs. The caſes which have been cited went upon that ground. In the caſe of *Jenkins* v. *Mackenzie*, though the ſhip was brought into port, yet the capture, as between the aſſurer and aſſured, was a total loſs. But *there is no inſtance where the owner can abandon, unleſs at ſome period or other of the voyage there has been a total loſs.* No ſuch event has happened here; for the jury have expreſsly found, that the loſs amounted only to 48 *l. per cent.* Even allowing *total loſs* to be a technical expreſſion, yet the manner, in which the plaintiff's counſel has ſtated it, is rather too broad. It has been ſaid, that the inſurance muſt be taken to be on the ſhip as well as on the voyage; but the true way of conſidering it is this: *it is an inſurance on the ſhip for the voyage.* If either the ſhip, or the voyage be loſt, that is a total loſs; but here neither
Vide ſupra. is loſt. The caſe of *Hamilton* v. *Mendes* is deciſive. Judgment for defendant.

In

In another caſe, an action was brought on a policy of inſurance on the *Prince of Wales*, in port or at ſea, for ſix months, from the 18th *July* 1777. The ſhip in queſtion was in government ſervice, bound from *Cork* to *Quebec*. She arrived there, but the ſeaſon being too far advanced before ſhe was ready to return, ſhe was removed into the baſon: but, on the 19th *November*, ſhe was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ſhip could not be examined till *April* following, after the expiration of the policy. She was then, however, found to be bulged and much injured, but not thought irreparably ſo. In the progreſs of the repair, difficulties aroſe for want of materials; and the captain, after conſulting the merchants and agents in the country, ſold her. An account was made up, charging the inſurers with the whole amount, and crediting them with the ſums for which the ſhip ſold, as ſalvage.

Furneaux v. Bradley, Eaſt. 20 Geo. III.

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Lord *Mansfield*, at the trial, ſaid: "The great point in the cauſe is, whether this is a total loſs by this accident. It is a new queſtion: upon which I ſhall reſerve a caſe for the opinion of the court." After argument by counſel on both ſides, his lordſhip ſaid, the juſtice of the caſe ſeemed to be, that the loſs in *November* ſhould be taken as an *average*, not a *total* one; and that the whole court were of opinion, that the ſhip ſhould be conſidered as damaged on the 19th of *November*, but not *totally loſt*.

In a ſubſequent caſe before Lord *Kenyon*, at *Niſi Prius*, it was held in an action on a policy for *ſix months*, where the ſhip had been captured and carried into *Charleſtown*, ſold by the captors, by authority of the *French* conſul there, and purchaſed by the captain for account of the original owners, that this was only to be conſidered as a partial loſs, and that the owners could not abandon, Lord *Kenyon* being of opinion that the captain was agent for the owners, recovering the veſſel upon their account, and paying a kind of ſalvage, the amount of which would be the loſs ſuſtained, and which only conſtituted an average loſs. His

M'Maſters v. Shoolbred, Sittings at G. H. after Mich. 35 Geo. III. Eſpinaſſe's caſes at N. P. 237. S. C.

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lordſhip, however, admitted, that when the ſhip had been captured and carried into port in the enemy's poſſeſſion, the aſſured at that period might have abandoned. But not having done ſo till the veſſel was recovered, they could now only go for an average loſs.

When the caſe of *M'Maſters* v. *Shoolbred* was before the court at *Niſi Prius*, it did not occur to the counſel for the defendant to object, that the act of the *French* conſul was illegal, and contrary to the law of nations; and conſequently that the money paid by the original owners, there being no ſentence of condemnation, was in the nature of a ranſom; and that ranſoms being poſitively prohibited by the ſtatutes of 22 *Geo.* III. ch. 25. and 33 *Geo.* III. ch. 66. ſ. 37, 38, & 39. the money paid by an aſſured for the ranſom could not be a charge upon the underwriter. But in a ſubſequent caſe, where this objection was taken, and a caſe reſerved upon it for the opinion of the court, the whole court, after two arguments, were unanimouſly of opinion that the objection was well founded; that money paid by an aſſured under thoſe circumſtances was a ranſom; and conſequently could not be recovered from the underwriters.

Havelock v. Rockwood, 8 Term Rep. p. 268. See ante, p. 69. and poſt, ch. 18.

Theſe caſes, and the judgments upon them, have been cited at length, becauſe the principles of abandonment are ſo clearly and accurately defined, and are ſo aptly illuſtrated by referring them to the particular circumſtances ariſing in thoſe cauſes, that it would be abſurd to inſiſt more upon the ſubject; as the reader muſt from them be able to collect every thing relative to abandonment. Nor let it be objected, that thoſe were almoſt all caſes of abandonment after a capture; for many of the rules there laid down were general in their nature, comprehending caſes of wreck, and detention, *mutatis mutandis*, as well as thoſe of capture. This will be beſt explained, by putting two poſſible caſes.

2 Burr. 696.

Suppoſe a neutral ſhip is arreſted, and detained by a foreign prince by an embargo, the owner immediately, upon hearing of this accident, would have a right to abandon; becauſe no man

man is bound to wait the event of an embargo. But if the ſame ſhip, that brings the account of the embargo, ſhould alſo inform him, that the embargo was taken off, that the ſhip had only been detained two or three days, that very trifling or no damage had ariſen, then it is impoſſible to ſay that the merchant may abandon; becauſe, as we have ſeen, it is a principle of good ſenſe, that a man cannot make his election, whether he will abandon or not, till he receive advice of the loſs; and if by the ſame conveyance, it appear that the peril is over, and the thing inſured is in ſafety, he has loſt his election entirely; becauſe he has, and can have no right to abandon when his property is ſafe.

2 Burr. 1211.

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The ſame principle governs in the caſe of wreck; for let us ſuppoſe a trunk of bullion, as in the caſe of *Da Coſta* v. *Firth*, to be the property inſured; and that, the ſhip being wrecked, this trunk of courſe goes to the bottom; the owner would inſtantly be entitled to abandon to the underwriter, and to call upon him to contribute, as in caſe of a total loſs. But if it ſhould ſo happen, that before the action was brought, or before the offer was made to abandon, the bullion ſhould be recovered, and reſtored to the owner, at the place of deſtination, upon paying a moderate ſalvage; in that caſe, it would fall within the rule of *Hamilton* v. *Mendes*; and the aſſured would only be entitled to recover an indemnity, according to the nature of his caſe, at the time when the action was brought; conſequently he would not be allowed to abandon.

4 Burr. 1966.

But it has been ſettled alſo by a ſolemn deciſion of the court of *King's Bench*, in what caſes a loſs ſhall be deemed to be total, after an accident by perils of the ſea. A policy was effected in *London* upon the *ſhip Grace*, her "*cargo* "and *freight*, at and from *Tortola* to *London*, warranted to "depart on or before the firſt of *Auguſt* 1781. The ſhip "valued at 2,470*l.* the freight at 2,250*l*, and the cargo at "12,400*l.* At a premium of 25 guineas *per cent.* to re-"turn 10 *per cent.* if ſhe depart the *Weſt Indies* with convoy "for *England* and arrives." At the head of the ſubſcriptions

Manning v. Newnham, Trin. 22 Geo. III.

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is the following declaration, *viz. on ſhip, freight, and goods, warranted free of particular average.* This ſhip, with her cargo, was a *Dutch* prize taken by a privateer of *Tortola*, and was there condemned; during the whole of her ſtay at *Tortola*, (four or five months) ſhe was never unloaded. On the firſt of *Auguſt* the whole fleet of merchantmen got under way, under the convoy of the *Cyclops*, *&c.* but not being able to get clear of the iſlands that day, they caſt anchor during the night, and the next day got clear of the iſlands. About 10 o'clock on the 2d of *Auguſt*, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain and make water ſo faſt, that the crew were obliged to work both pumps; and, on the third, the captain made a ſignal of diſtreſs: in conſequence of which, ſhe was obliged to return to *Tortola*, under protection of one of his majeſty's ſhips. The captain made his proteſt, and a ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt Indies*: and that many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral of the caſks broke and in bad order. The ſhip and the whole of the cargo were ſold accordingly at *Tortola*. The aſſured claim a total loſs of ſhip, cargo, and freight, which the jury thought right, and found accordingly. A motion was made for a New Trial, which upon full conſideration was refuſed,

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Lord *Mansfield*, after ſtating the evidence, and that his prejudices at the trial were in favour of the underwriters, proceeded thus: "but notwithſtanding this inclination of my opinion, upon full conſideration we think the jury have done right. If by a peril inſured the voyage is loſt, it is a total loſs; otherwiſe not. In this caſe the ſhip has an irreparable hurt within the policy; this drives her back to *Tortola*, and there is no ſhip to be had there, which could take the whole cargo on board. There were only two ſhips at *Tortola*, and both could not take in the cargo. To ſhew how completely the voyage was loſt, and that no ſhip could be got, the aſſured have not been able to ſend that part of the goods, which they purchaſed, forward to *London*. It is admitted there was a total

total loſs on the freight, becauſe the ſhip could not perform the voyage. The ſame argument applies to the ſhip and cargo. It is a contract of indemnity; and the inſurance is that the ſhip ſhall come to *London*. Upon turning it in every view, we are of opinion that the voyage was totally loſt, and that is the ground of our determination." The rule was diſcharged.

From what was ſaid in a former chapter, and from the caſes juſt recited, it will appear, that in wager policies, it was uſual to ſet up a total loſs between third perſons, for the purpoſe of their wager, though in fact the ſhip was ſafe, and reſtored to the owner. But in ſome of theſe caſes, the loſs was held not to be total; and as in moſt of them general verdicts were given, and no report of the judge's direction is to be found, it is now impoſſible to determine upon what grounds the deciſions turned. As has been truly ſaid, however, theſe queſtions never can ariſe again, becauſe they originated from wager policies, which are now prohibited by law. But as the caſe of *Pole* v. *Fitzgerald* was one of thoſe, in which the majority of the judges, and the Houſe of Lords held, that though the ſhip might be deemed loſt for a time; yet as ſhe was afterwards recovered, the event of a total loſs had not finally happened, according to the conſtruction of the wager; and as it has frequently occurred in the courſe of our enquiries, it may be proper to give a ſhort account of it in this place.

Ch. 4 p. 69.

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It was an action on a policy of inſurance on the ſhip *Goodfellow* privateer, at and from *Jamaica*, to any ports and places where and whatſoever, at ſea or ſhore, a cruiſing from place to place, for and during the term and ſpace of four calendar months; the ſhip was valued at 1000 *l. without further account*, and free from average. The defendant in 1744, had ſubſcribed 100 *l.* and the plaintiff declared for a total loſs of the voyage by a mutiny of the men.

Fitzgerald v. Pole, 5 Brown's Parl. Caſes, 131.

The cauſe came on to be tried at *Guildhall* before the Lord Chief Juſtice *Lee*, when a ſpecial verdict was found, ſtating,

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That the defendant had ſubſcribed the policy, ſtated in the declaration: that the *Goodfellow* was an *Engliſh* privateer, duly commiſſioned; was ſafe at *Jamaica* on the 14th of *June* 1744, and ſailed from thence the ſame day: that on the 10th of *July* 1744, ſhe took a *French* prize of the value of 4,200 *l.* ſterling: that afterwards the ſaid ſhip was ſailing on her cruiſe, for a port or place called the *River of Dogs*, to fetch water; and while ſhe was ſo ſailing towards the *River of Dogs*, and within the four months mentioned in the policy, the crew mutinied againſt the captain and his officers; and by force carried the ſaid ſhip againſt the will of the captain and officers, who could not reſiſt, to *Jamaica*: and before her arrival there, cauſeleſsly, againſt the conſent of the ſaid captain, ſeized the boat, fire-arms, and cutlaſſes, carried off the ſame, and deſerted the privateer, by which the voyage and cruize were totally prevented and loſt for the remainder of the four months: that the ſhip arrived at *Jamaica* [171] and was there in good ſafety at and after the end of the four months; but was prevented by the mutiny and deſertion, from further purſuing her cruiſe: that the perſon inſured had intereſt in the ſhip to the amount of the ſum inſured.

This caſe was argued in the King's Bench, and judgment was given for the plaintiff. Upon a writ of error, the Court of Exchequer Chamber unanimouſly reverſed that judgment. The Houſe of Lords afterwards confirmed the judgment of reverſal, being of opinion, with the majority of the judges, that the inſurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in caſe of a total loſs; and the ſhip being found, by the ſpecial verdict, to be in good ſafety, at her proper port, at and after the end of the four months, for which the inſurance was made, there could be no loſs. The counſel for the plaintiff cited many caſes, in which the plaintiffs had judgment for a total loſs, although the ſhips remained in being; moſt of which have already been referred to in the chapter upon capture. But thoſe caſes were abſolutely denied by the other ſide; or, if admitted at all, it was inſiſted, that they made for the defendant. This circumſtance, among many others, ſtated in the introduction of this

Vide ante, c. 4. p. 73. 2 Burr. 1202.

See the Introduction ſub fine.

this work, ſerves to evince the great ſuperiority which the modern practice of our courts, in matters of inſurance, has over the ancient. CHAP. IX.

In many of the maritime countries on the continent of *Europe*, the time, within which the abandonment muſt be made, is fixed by poſitive regulation. Thus in *France*, it is ordained, that all ceſſions or abandonments, as well as demands in virtue of the policy, ſhall be made as follows: In ſix weeks, for loſſes happening on the coaſts of the country, where the inſurance was made: in three months, in other provinces of our kingdom: in four months, on the coaſt of *Holland*, *Flanders*, and *England*: in a year, in *Spain*, *Italy*, *Portugal*, *Barbary*, *Muſcovy*, *Norway*: and in two years, for the coaſt of *America*, the *Braſils*, *Guinea*, and other diſtant countries. When theſe terms are elapſed, the demands of the aſſured ſhall not afterwards be admitted. In caſes of detention, the ſame ordinance provides, that the abandonment ſhall not be made before ſix months, if it happen in *Europe* or *Barbary*. If in a more diſtant country, in a year; both to commence from the day of the notifying this detention to the inſurers. A ſimilar regulation to that laſt mentioned is to be found in the ordinances of *Bilboa*. Ord. of Lew. 14. tit. Inſurance, art. 48. [172] Art. 49. 2 Mag. 416.

In the law of *England* till lately we had no limitation of time, with reſpect to abandonment, at leaſt that I was able to find: and I believe that none ſuch exiſted. But from what has been ſaid in the preceding part of this chapter, it would appear, that the inſured has a right to call upon the underwriter for a total loſs, and of courſe to abandon, as ſoon as he hears of ſuch a calamity having happened, his claim to an indemnity not being at all ſuſpended by the chance of a future recovery of part of the property loſt: becauſe, by the abandonment, that chance devolves upon the underwriter, by which means the intention of the contracting parties is fully anſwered, and complete juſtice is done.

In a modern deciſion it has been held by the court of *King's Bench*, that as ſoon as the inſured receive accounts of ſuch a loſs Mitchell v. Edie, 1 Term R. 608.

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loſs as entitles them to abandon, they muſt, in the firſt inſtance, make their election whether they will abandon or not: and if they abandon, they muſt give the underwriters notice in a reaſonable time, otherwiſe they waive their right to abandon, and can never afterwards recover for a total loſs. This determination was certainly equitable and juſt; for otherwiſe it was impoſſible to ſay, at what time the reſponſibility of the underwriter was to end, they would be liable to be called upon to contribute at any indefinite period, and a great deal of uncertainty would be introduced into this ſyſtem of law.

In a ſtill more recent caſe, the doctrine laid down by the court in *Mitchell* v. *Edie*, as to the obligation upon the aſſured to make his election, whether he will abandon or not, was adopted and confirmed.

Allwood v. Henckell, Guildhall Sittings in E. R. after Michaelmas, 1795.

Caſe on a policy of aſſurance on linen on board the *Amphitrite*, at and from *London* to *Jamaica*.

The *Amphitrite* was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property inſured was plundered and taken out of the ſhip. The captain, boatſwain, and all but ſeven men, were taken out of her: a fortnight after ſhe was captured, as the captors were making their way to *America*; the ſhip with the remainder of her cargo was retaken by an *Engliſh* frigate, and taken under a prize maſter to *Antigua*. The ſhip and cargo were both ſold under a decree of the Vice Admiralty Court of *Antigua*, by a prize agent, who received the proceeds, and was to pay them over to the concerned, upon payment of one eighth ſalvage purſuant to the laſt prize act.

The capture and recapture were entered at *Lloyd's*, on the 15th of *February* 1795; but it was not known where the ſhip was carried till the 30th of *March*, when a letter was received at *Lloyd's*, addreſſed to the owners and freighters and underwriters on ſhip *Amphitrite* and cargo, from the judge of the Vice Admiralty Court of *Antigua*, informing them of the arrival and ſale of ſhip and cargo under a decree of the court,

and

and desiring to have some agent appointed to remit the proceeds to *England*. Powers of attorney were sent out in *April* by the assured for this purpose; and the proceeds were desired to be remitted to the banking-house of *Smith*, *Payne*, and *Smith*, one of which gentlemen was agent to the assured. The defendant was acquainted in *April* of the loss, but no abandonment was proved to have been made till *August*, near four months after Mr. *Payne*, who was the plaintiff's agent, had sent out the power of attorney. On the part of the plaintiff, it was contended that, admitting there was no abandonment, in this case the property having been absolutely sold and converted into money, before the parties knew where the ship was taken to, the loss was absolutely total in its nature; and therefore there was no occasion for an abandonment.

Lord *Kenyon*, though he did not give any decided opinion upon this point, inclined to think, "that an abandonment was necessary; and that the case was the same as if the property had remained in *specie* at *Antigua*, and had not been sold (*a*). That the assured is not bound to abandon in any case; and might, in case the sales had been very advantageous, have taken the benefit of them in the same manner as they might have retained this property, if it had remained in specie. *But the assured must make his election speedily, whether he will abandon or not, and put the underwriter into a situation to do all that is necessary for the preservation of the property, whether sold or unsold. He cannot lie by and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them.*"

Verdict for plaintiff, subject to an account as for an average loss.

But if the insured, hearing that his ship is much disabled and has put into port to repair, express his desire to the under- Da Costa v. Newnham, 2 Term R. 407.

(*a*) In the case of Hodgson and another v. Blackiston, Sittings after Hil. Term, 38 Geo. III. in the King's Bench, it was held, that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received.

writers

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writers to abandon, and be diſſuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the ſubſequent damage occaſioned by that refuſal, though it ſhould amount to the whole ſum inſured. Becauſe the reaſon why notice of abandonment is deemed neceſſary, is to prevent ſurprize or fraud upon the underwriter: but in the caſe put, they have, by their own act, ſuperſeded the neceſſity of notice.

We have thus taken a view, in this and the eight preceding chapters, of the nature of that inſtrument by which the contract of inſurance is effected; and of the different modes, by which it may be conſtrued: we have treated of the various loſſes, to which the underwriter ſubjects himſelf by that contract; we have ſhewn, when the loſſes are to be conſidered as partial, when as total; and in what caſes, and under what circumſtances, the inſured ſhall be allowed to abandon to the underwriter. The courſe of our enquiry now naturally leads us to obſerve, in what inſtances the inſurer is diſcharged from any reſponſibility; either on account of the contract being void, from its commencement, by reaſon of ſome radical defect; or becauſe the inſured has failed to perform ſome of thoſe conditions, neceſſary to be fulfilled on his part, before he can call upon the inſurer for an indemnity.

CHAPTER THE TENTH.

Of Fraud in Policies.

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IN treating of thoſe cauſes, which make policies void from the beginning, or in other words which abſolutely annul the contract, it will be proper in the firſt place to conſider, how far it will be affected by any degree of fraud. In every contract between man and man, openneſs and ſincerity are indiſpenſably neceſſary to give it its due operation; becauſe, fraud and cunning once introduced, ſuſpicion ſoon follows, and all confidence and good faith are at an end. No contract can be good, unleſs it be equal; that is, neither ſide muſt have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in thoſe of inſurance; becauſe the underwriter computes his riſk entirely from the account given by the perſon inſured, and therefore it is abſolutely neceſſary to the juſtice and validity of the contract, that this account be exact and complete. Accordingly the learned judges of our courts of law, feeling that the very eſſence of inſurance conſiſts in a rigid attention to the pureſt good faith, and the ſtricteſt integrity, have conſtantly held that it is vacated and annulled by any the leaſt ſhadow of fraud or undue concealment.

2 Black. Com. 460. Grot. de jure belli, lib. 2. c. 12. ſ. 23. Puffendorff de jure nat. l. 5. c. 9. ſ. 8. Bynkerſhoek, queſt. jur. priv. l. 4. c. 26. Ord. de Lew. 14. ſ. 38. 1 Black. 594. 3 Burr. 1909.

After what has been ſaid, it will hardly be neceſſary to mention, that both parties, the inſurer and inſured, are equally bound to diſcloſe circumſtances that are within their knowledge; and therefore if the inſurer, at the time he underwrites, can be proved to have known that the ſhip was ſafe arrived, the contract will be equally void, as if the inſured had concealed from him ſome accident, which had befallen the ſhip.

In peruſing the numerous caſes and deciſions, which, I am ſorry to ſay, are to be found in our books under this head, it occurred to me, that they were liable to a threefold diviſion:

1ſt, The

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dition of the thing insured: because the plaintiff insured neutral property, and this was not neutral property.

From the preceding case, we may collect this principle, that a false assertion in a policy will vitiate the contract; even though the loss happen in a mode not affected by that falsity.

Another observation is suggested by the perusal of the case of *Woolmer* and *Muilman*. It arose upon a warranty; and the learned judges declared, that the warranty being false, there was *no* contract. Now, as we shall see, when we come to the chapter on warranties, the general rule with respect to them is this, that the noncompliance with them does not vacate the contract from the beginning; but it amounts to much the same thing, namely, that the insured, not having complied with those conditions, which he had taken upon himself to perform, cannot recover against the underwriter.

But the following answer is submitted, which, if allowed, will reconcile any seeming difference, that arises in the cases upon the subject. Wherever a man warrants a thing to be true, which, at the time he does so, he must unavoidably know to be false, it comes under the *allegatio falsi*, and the contract is void, as in the case just reported. But if he warrant or undertake that a certain thing shall be done, for instance, that the ship shall sail with convoy, or on a particular day; these being circumstances materially varying the risk, the underwriter shall not be responsible for a loss, if they are not complied with; but the contract is not void from the beginning, nor does the insured incur any moral guilt; because they do not depend entirely for their performance upon the will of the person insured, nor could they be within his knowledge, at the time he entered into the contract.

A short time after the case of *Woolmer* against *Muilman* had been decided, another very similar case came on at *Guildhall* before Lord *Mansfield*.

It

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It was an action on a policy of insurance on goods laden on board such a ship, warranted a *Portugueze*. The insurance was made during the *French* war, when the premium would have been much higher on an *English* ship. The plaintiff gave partial evidence of her being a *Portugueze*; and that she was obliged, on account of perils of the sea, to put into a *French* port, by which the cargo was spoiled. This was admitted by the defendant, who contended that during her stay at the *French* port, she was libelled, and condemned as not being *Portugueze:* and that although the goods were lost by a different peril, yet in fact the ship was not *Portugueze*, (being insured as such), and that this vitiated the policy *ab initio*—and this was agreed to be law. In order to prove that she was not *Portugueze*, the defendant produced the sentence of condemnation, and the confirmation thereof in the courts of *France*; and an answer of the present plaintiff in the court of Chancery here, by which it was admitted, that the ship was condemned as not being, or under pretence of not being, *Portugueze*.

Fernandes v. De Costa, Sittings after Hil. 4 G. 3.

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Lord *Mansfield*.—"As the sentence is always general (without expressing the reason of the condemnation) attested copies of the libel ought in strictness to have been produced, to shew upon what ground the ship was libelled against. But as the plaintiff has by his answer in Chancery admitted that she was condemned, as not being *Portugueze*; when added to the expression used in the sentence of confirmation, *that the ship was condemned in the court of prizes*, there is sufficient evidence for us to proceed upon." The defendant, the underwriter, had a verdict.

The second species of fraud, which affects insurances, is the concealment of circumstances, known only to one of the parties entering into the contract. Upon this head, the principles of law are perfectly clear, free from doubt or possibility of error. Concealment of circumstances vitiates all contracts, upon the principles of natural law. Insurance is a contract of speculation. The facts, upon which the risk is to be computed, lie, for the most part, within the knowledge of the in-

1 Black. Rep. 465.

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1 Black. Rep. 594.

sured only. The underwriter muſt therefore rely upon him for all neceſſary information; and muſt truſt to him, that he will conceal nothing, ſo as to make him form a wrong eſtimate. If a miſtake happen, without any fraudulent intention, ſtill the contract is annulled, becauſe the riſk is not the ſame which the underwriter intended. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his belief of the contrary.

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Theſe principles have been uniformly ſupported by a variety of deciſions.

DaCoſta v. Scandret, in Chancery, 2 P. Will. 170.

One having a doubtful account of his ſhip, that was at ſea, namely, that a ſhip, deſcribed like his, was taken, inſured her, without giving any notice to the inſurers of what he had heard either as to the hazard, or the circumſtances, which might induce him to believe that his ſhip was in great danger, if not actually loſt. The inſurers bring a bill for an injunction, and to be relieved againſt the inſurance as fraudulent.

Lord Chancellor *Macclesfield*.—"The inſured has not dealt fairly with the inſurers in this caſe; he ought to have diſcloſed to them what intelligence he had of the ſhip's being in danger, and which might induce him, at leaſt, to fear that it was loſt, though he had no certain account of it. For if this circumſtance had been diſcovered, it is impoſſible to think, that the inſurers would have inſured the ſhip at ſo ſmall a premium as they have done; but either would not have inſured at all, or would have inſiſted on a larger premium, ſo that the concealment of this intelligence is a fraud." Whereupon the policy was decreed to be delivered up with coſts, but the premium to be paid back, and allowed out of the coſts.

Seaman v. Fonnereau, 2 Stra. 1183.

In another caſe it appeared, that on the 25th of *Auguſt* 1740, the defendant underwrote a policy from *Carolina* to *Holland*. It came out in evidence, that the agent for the plaintiff had on the 23d of *Auguſt* (two days before the policy was effected), received a letter from *Cowes*, dated the 21ſt of *Auguſt*, wherein

in it is ſaid: "On the 12th of this month, I was in company "with the ſhip *Davy* (the ſhip in queſtion); at twelve at night "loſt ſight of her all at once; the captain ſpoke to me the day "before that he was leaky, and the next day we had a hard "gale." The ſhip, however, continued her voyage till the 19th of *Auguſt*, when ſhe was taken by the *Spaniards*; and there was no pretence of any knowledge of the actual loſs at the time of the inſurance, but it was made in conſequence of a letter received that day from the plaintiff abroad, dated the 27th *June* before.

Lord Chief Juſtice *Lee* declared, "that as theſe are contracts upon chance, each party ought to know all the circumſtances. And he thought it not material, that the loſs was not ſuch an one as the letter imported; for thoſe things are to be conſidered in the ſituation of them at the time of the contract, and not to be judged of by ſubſequent events. He therefore thought it a ſtrong caſe for the defendant." The jury found accordingly. [180]

In an action on a policy of inſurance, the caſe was, that the ſhip was inſured *at and from Genoa*, liable to average; her loading conſiſting of pot-aſh, verdigreaſe, cotton, and other periſhable commodities. This loading was put on board *at Leghorn* the 10th of *Auguſt*, and the veſſel had lain at *Genoa* above five months, being originally bound for *Dublin*; but loſing her convoy, ſhe put into *Genoa* the 13th of *Auguſt*, and lay there till the 5th of *January*, when ſhe ſailed. And the inſurance was made the 20th of *January*; at which time theſe circumſtances were known to the aſſured, but not communicated to the underwriter. A few days after ſhe put to ſea, ſhe was ſhattered by a ſtorm, and the cargo conſiderably damaged. The jury found a verdict for the plaintiff; and a new trial was moved for on this ground, that the policy was bad *ab initio*, for want of a due diſcloſure of the circumſtances. Hodgſon v. Richardſon, 1 Blac. Rep. 463.

Lord *Mansfield*.—"The queſtion is, whether here was a ſufficient diſcloſure; that is, whether the fact concealed was material to the riſk run. This is a matter of fact; and if ma-

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terial, the conſequence is matter of law, that the policy is bad. Now who can ſay, that no riſk was run, during the five months ſtay at *Genoa*, or no damage happened in that period? The policy is founded on miſrepreſentation: the ſhip is inſured "at and from *Genoa* to *Dublin*; the adventure to begin "from the loading, to equip for this voyage." This plainly implies, that *Genoa* was the port of loading: and at the trial, all the witneſſes ſaid, that by uſage, it was material to acquaint the underwriter, whether the inſurance was to be at the commencement or in the middle of a voyage.

Mr. Juſtice *Wilmot*.—"The fact diſcloſed by this policy is not true, that *Genoa* is the loading port; for ſo it muſt be underſtood. In ſuch caſes I will not ſpeculate upon the materi-
[181] ality, or immateriality of the fact. Not but that I think, the length of the ſtay at *Genoa*, is very material, in caſe of ſuch periſhable commodities."

Mr. Juſtice *Yates*.—"The concealment of material circumſtances vitiates all contracts, upon the principles of natural law. A man, if kept ignorant of any material ingredient, may ſafely ſay, it is not his contract. And I think this fact material, for the reaſons before given." A new trial was accordingly granted.

The doctrine, ſo accurately laid down in the preceding caſes, has ſince been the principle, on which ſeveral verdicts have been given, in cauſes of this nature; a few of which it will be proper to mention.

Ratcliffe and another v. Shoolbred, Sitt. at Guild. after Trin. 1780.

An action was brought on a policy of aſſurance on goods, on board the *Matty* and *Betty*, at and from the coaſt of *Africa*, to her laſt diſcharging port in the *Britiſh Weſt Indies*. The objection made to paying the loſs was, that there had been a material concealment, or miſrepreſentation of the true ſtate or ſituation of the ſhip and voyage at the time of underwriting the policy. The ſhip had been ſent out to trade on the coaſt of *Africa*, with directions to proceed from thence to the *Britiſh Weſt Indies*, and to ſtop at *Barbadoes*, if ſhe could

get a *ſale*; if not, to proceed to *Montego-Bay*. On the 2d of *October* ſhe ſailed from *St. Thomas's* on the coaſt of *Africa*, with a cargo of ſlaves, and was taken on the 6th of *December* following by an *American* privateer. A letter was received by a houſe at *Liverpool* on the 21ſt of *February*, mentioning, that the ſhip was well, and had ſailed from *St. Thomas's* on the 2d of *October*. This information was communicated next day to the plaintiffs, who, in conſequence of it, wrote the ſame evening to two different brokers, to get a *new* inſurance on the ſhip, there having been one before, and another on the cargo, which laſt was the ſubject of the preſent action. In the inſtructions to the brokers, the plaintiffs ſay nothing of the ſhip from the time of her firſt ſailing; but to one of the brokers, they wrote thus; "we ſhould be "glad, if you would get us 600 *l.* more on the ſhip, as ſhe "is *rather long*; and we think it not prudent to run ſo large "a riſk at ſo critical a time. We expect to hear ſoon "of her." It had afterwards occurred, that the policy might be affected, if intimation was not given of the letter, which had been received. The broker, therefore, by direction of the plaintiffs, added to the inſtructions: "the above "ſhip was on the coaſt the 2d of *October*;" but ſaid nothing of her having ſailed from *St. Thomas*. The policy was dated the 21ſt of *March*.

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Lord *Manſfield*.—"The inſured is bound to repreſent to the underwriter all the material circumſtances of the ſhip and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable: *à fortiori*, if he ſuppreſs or miſrepreſent from fraud. The queſtion is, whether this be one of thoſe caſes, which is affected by miſrepreſentation or concealment? If the plaintiffs concealed any material part of the information they received, it is a fraud; and the inſurers are not liable." The jury found for the defendant agreeably to his lordſhip's direction.

In another caſe, the policy was on the brig *Richard* at and from *Plymouth* to *Briſtol*. Several letters paſſed between the plaintiff and the broker, who effected the policy, as to the

Fillis v. Brutton, Sittings at Guildh. after Hill. 1782.

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premium at which the insurance could be made: at last, it was underwritten at four guineas *per cent.* The broker's instructions stated *the ship ready to sail on the* 24th *of December.* The broker represented to the underwriter, that the ship was in port, when in fact she had sailed the 23d of *December.*

Lord *Mansfield* said, "that this was a material concealment and misrepresentation." The jury, however, hesitated: his lordship then laid down the following as general principles.—"In all insurances, it is essential to the contract, that the assured should represent the true state of the ship to the best of his knowledge. On that information the underwriters engage. If he state that as a fact, which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth. In the present insurance, the only material point is this: had the ship sailed, or was she in port?" Upon this, the jury found for the defendant.

But although the rule is laid down thus generally, that one of the contracting parties is bound to conceal nothing from the other; yet it is by no means so general, as not to admit of an exception. *Aliud est celare, aliud tacere.* There are many matters as to which the insured may be innocently silent. 1st, As to what the insurer knows, however he came by that knowledge. 2d, As to what he ought to know. 3d, As to what lessens the risk. An underwriter is bound to know political perils, as to the state of war or peace. If he insure a privateer, he needs not be told her destination. And, as men reason differently from the same facts, he needs not be told another's conclusions from known facts.

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1 Black. Rep. 593.

These ideas were fully entered into, explained, and illustrated in the argument of Lord *Mansfield*, in delivering the opinion of the court in *Carter* v. *Boehm*.

Carter v. Boehm, 3 Burr. 1905. and 1 Black. R. 593. Vide ante. c. 7. p. 12.

This was an insurance cause upon a policy, interest or no interest, without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, governor *George Carter*. The jury found a verdict for the plaintiff; upon which

which a new trial was moved for, on the ground, that circumſtances had not been ſufficiently diſcloſed. Lord *Mansfield* reported the evidence given at the trial; by which it appeared, that it was a policy of inſurance for one year, namely, from the 16th of *October* 1759, to the 16th *October* 1760, for the benefit of the governor of *Fort Marlborough*, *George Carter*, againſt the loſs of *Fort Marlborough*, in the iſland of *Sumatra*, in the *Eaſt Indies*, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count *D'Eſtaigne*, within the year. The firſt witneſs was *Cawthorne*, the broker, who produced the memorandum given by the governor's brother (the plaintiff) to him; and the uſe made of theſe inſtructions was to ſhew, that the inſurance was made for the benefit of governor *Carter*, and to inſure him againſt the taking of the fort by a foreign enemy. Both parties had been long in Chancery; and the depoſitions, there made on both ſides, were read as evidence upon this trial. It was objected on behalf of the defendant, to be a fraud, by concealment of circumſtances, which ought to have been diſcloſed; and particularly the weakneſs of the fort, and the probability of its being attacked by the *French*: which concealment was offered to be proved by two letters. The firſt was a letter from the governor to his brother *Roger Carter*, his truſtee, and the plaintiff in this cauſe: the ſecond was from the governor to the *Eaſt India* Company.

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The evidence in reply to this objection, conſiſted of three depoſitions in Chancery; ſetting forth, that the governor had 20,000*l.* in effects; and had only inſured 10,000*l.*: and that he was guilty of no fault in defending the fort. The firſt of theſe depoſitions, was captain *Tryon's*, which proved, that this was not a fort proper, or deſigned, to reſiſt *European* enemies; but only calculated for defence againſt the natives of the iſland of *Sumatra*: that the governor's office is not military, but only mercantile: and that *Fort Marlborough* is only a ſubordinate factory to *Fort St. George*. There was no evidence to the contrary; and a ſpecial jury found a verdict for the plaintiff.

CHAP. X. After argument at the bar, upon the motion for a new trial, and time taken by the court to deliberate, their unanimous opinion was delivered by

Lord *Mansfield*.—"This is a motion for a new trial. In ſupport of it, the counſel for the defendant contend, that ſome circumſtances in the knowledge of governor *Carter*, not having been mentioned at the time the policy was underwritten, amount to a concealment, which ought, in law, to avoid the policy. The counſel for the plaintiff inſiſt, that the not mentioning theſe particulars does not amount to a concealment, which ought, in law, to avoid the policy; either as a fraud, or as varying the contract. 1ſt, It may be proper to ſay ſomething in general of concealments which avoid a policy. 2dly, To ſtate particularly the caſe now under conſideration. 3dly, To examine, whether the verdict, which finds this policy good, although the particulars objected were not mentioned, is well founded.

"Firſt, Inſurance is a contract upon ſpeculation. The ſpecial facts, upon which the riſk is to be computed, lie moſt commonly in the knowledge of the inſured only. The underwriter truſts to his ſtatement, and proceeds upon confidence, that he does not keep back any circumſtances within his knowledge, to miſlead the underwriter into a belief that the circumſtance does not exiſt, and to induce him to eſtimate the riſk, as if it did not exiſt. The keeping back ſuch circumſtance is a fraud; and therefore the policy is void. Although the
[185] ſuppreſſion ſhould happen through miſtake, without any fraudulent intention; yet ſtill the underwriter is deceived, and the policy is void: becauſe the riſk run is really different from the riſk underſtood, and intended to be run at the time of the agreement. The policy would equally be void againſt the underwriter, if he concealed any thing; as if he inſured a ſhip on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that

that fact, and his believing the contrary. But either party may be innocently ſilent as to grounds open to both, to exerciſe their judgments upon. *Aliud eſt celare; aliud tacere: neque enim id eſt celare quicquid reticeas; ſed cum quod tu ſcias, id ignorare, emolumenti tui cauſâ, velis eos, quorum interſit id ſcire.* This definition of concealment, reſtrained to the efficient motives, and preciſe ſubject of any contract, will generally hold to make it void, in favour of the party miſled by his ignorance of the thing concealed. There are many matters, as to which the inſured may be innocently ſilent; he needs not mention what the underwriter knows, *ſcientia utrinque par pares contrahentes facit.* An underwriter cannot inſiſt that the policy is void, becauſe the inſured did not tell him what he actually knew, what way ſoever he came to the knowledge. The inſured needs not mention what the underwriter ought to know; what he takes upon himſelf the knowlege of; or what he waives being informed of. The underwriter needs not be told what leſſens the riſk agreed, and underſtood to be run by the expreſs terms of the policy. He needs not be told general topics of ſpeculation: as for inſtance, the underwriter is bound to know every cauſe, which may occaſion natural perils; as the difficulty of the voyage; the kind of ſeaſons; the probability of lightning, hurricanes, and earthquakes. He is bound to know every cauſe which may occaſion political perils; from the rupture of ſtates; from war, and the various operations of war. He is bound to know the probability of ſafety, from the continuance and return of peace; from the imbecility of the enemy, through the weakneſs of their councils, or their want of ſtrength. If an underwriter inſure private ſhips of war, by ſea, and on ſhore from ports to ports, and from places to places, any where, he needs not be told the ſecret enterpriſes, upon which they are deſtined: becauſe he knows ſome expedition muſt be in view: and from the nature of his contract, he waives the information, without being told. If he inſure for three years he needs not be told any circumſtance to ſhew it may be over in two: or, if he inſure a voyage with liberty of deviation, he needs not be told what tends to ſhew there will be no deviation. Men argue differently, from natural phœnomena, and political appearances: they have different capacities, different degrees of know-

Cicero de Officiis, lib. 3. c. 12, 13.

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the *French*: that the governor at that time bought of the witneſs goods to the value of 4,000 *l.* and had goods to the value of above 20,000 *l.* and then dealt for 50,000 *l.* and upwards: that on the 1ſt of *April* 1760, the fort was attacked by a *French* man of war of 64 guns, and a frigate of 20 guns, under the *Comte D'Eſtaigne*, brought in by *Dutch* pilots, was unavoidably taken, and afterwards delivered to the *Dutch*, the priſoners being ſent to *Batavia*. On the part of the defendant, after all the opportunities of enquiry, no evidence was offered, that the *French* ever had any deſign upon *Fort Marlborough*, before the end of *March* 1760; or that there was the leaſt intelligence or alarm, that they might make the attempt till the taking of *Nattal*, in the year 1760. They did not offer to diſprove the evidence, that the governor had acted, as in full ſecurity, long after the month of *September* 1759; and had turned his money into goods, ſo late as the 8th of *February* 1760. There was no attempt to ſhew that he had not loſt by the capture very conſiderably beyond the value of his inſurance. But the defendant relied upon a letter, written to the *Eaſt India* Company, bearing date the 16th of *September* 1759, which was ſent to *England* by the *Pitt*, captain *Wilſon*, who arrived in *May* 1760, together with the inſtructions for inſuring: and alſo a letter bearing date the 22d of *September* 1759, ſent to the plaintiff by the ſame conveyance, and at the ſame time (which letters his lordſhip repeated). They relied too upon the croſs examination of the broker who negotiated the policy, that *in his opinion*, theſe letters ought to have been produced, or the contents diſcloſed; and, that if they had, the policy would not have been underwritten. The defendant's counſel contended at the trial, as they have done upon this motion, that the policy was void: 1ſt, Becauſe the ſtate and condition of the fort, mentioned in the governor's letter to the *Eaſt India* Company was not diſcloſed. 2dly, Becauſe he did not diſcloſe, that the *French*, not being in a condition to relieve their friends upon the coaſt, were more likely to make an attack upon this ſettlement, rather than remain idle: 3dly, That he had not diſcloſed his having received a letter

[189] of the 4th of *February* 1759; from which it ſeemed, that the *French* had a deſign to take this ſettlement, by ſurprize,

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the year before. They alſo contended, that the opinion of the broker was almoſt deciſive: the whole was laid before the jury, who found for the plaintiff. CHAP. X.

"Thirdly, It remains to conſider theſe objections; and to examine whether this verdict is well founded. To this purpoſe, it is neceſſary to conſider the nature of the contract, at the time it was made. The policy was ſigned in *May* 1760. The contingency was, whether *Fort Marlborough* was or would be taken, by an *European* enemy, between *October* 1759 and *October* 1760. The computation of the riſk depended upon the chance, whether any *European* power would attack the place by ſea. If they did, it was incapable of reſiſtance. The underwriter at *London*, in *May* 1760, could judge much better of the probability of the contingency, than governor *Carter* could at *Fort Marlborough* in *September* 1759. He knew the ſucceſs of the operations of the war in *Europe:* he knew what naval force the *Engliſh* and *French* had ſent to the *Eaſt Indies*. He knew, from a compariſon of that force, whether the ſea was open to any ſuch attempt by the *French*. He knew, or might know, every thing which was known at *Fort Marlborough* in *September* 1759, of the general ſtate of affairs in the *Eaſt Indies*, or the particular condition of *Fort Marlborough*, by the ſhip which brought the orders for the inſurance. He knew that ſhip muſt have brought many letters to the *Eaſt India* Company: and particularly from the governor. He knew what probability there was of the *Dutch* committing, or having committed hoſtilities. Under theſe circumſtances, and with this knowledge, he inſures againſt the general contingency of the place being attacked by an *European* power. If there had been any deſign on foot, or enterprize begun, in *September* 1759, to the knowledge of the governor, it would have varied the riſk underſtood by the underwriter; on account of his not being told of a particular deſign or attack *then ſubſiſting*; and he eſtimated the riſk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any deſign ſubſiſting in *September* 1759. There was no ſuch deſign in fact: the attempt was made without premeditation, from the ſudden opportunity of

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of a favourable occaſion, by the connivance and aſſiſtance of the *Dutch*, which tempted *Comte D'Eſtaigne* to break his parole. Theſe being the circumſtances, under which the contract was entered into, we ſhall be better able to judge of the objections upon the foot of concealments. The firſt concealment is, that he did not diſcloſe the condition of the place. The underwriter knew the inſurance was for the governor. He knew the governor muſt be acquainted with the ſtate of the place. He knew the governor could not diſcloſe it, conſiſtently with his duty. He knew the governor, by inſuring, apprehended, at leaſt, the poſſibility of an attack. With this knowledge, without aſking a queſtion, he underwrote. By ſo doing, he took the knowledge of the ſtate of the place upon himſelf. It was a matter, as to which he might be informed various ways: it was not a matter, within the private knowledge of the governor only. But not to rely upon that, the utmoſt which can be contended is, that the underwriter truſted to the fort being in the condition in which it ought to be: in like manner, as it is taken for granted, that a ſhip inſured is ſea worthy. What is that condition? All the witneſſes agree, that it was only to reſiſt the natives, and not an *European* force. The policy inſures againſt a total loſs, taking for granted, that if the place was attacked, it would be loſt. The contingency, therefore, which the underwriter has inſured againſt is, whether the place would be attacked by an *European* force; and not whether it would be able to reſiſt ſuch an attack, if the ſhips could get up the river. It was particularly left to the jury to conſider whether this was the contingency in the contemplation of the parties: they have found that it was. And we are all of opinion, that in this reſpect, their concluſion is agreeable to the evidence. The ſtate and condition of the place were material in this view only, in caſe of a land attack by the natives.

"The ſecond concealment is, his not having diſcloſed, that, from the *French* not being able to relieve their friends upon the coaſt, they might make them a viſit. This is no part of the fact of the caſe: it is mere ſpeculation of the governor, from the general ſtate of the war. The conjecture was dictated

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tated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it, in this caſe, depended upon the *Engliſh* naval forces in thoſe ſeas, of which the underwriter could better judge at *London* in *May* 1760, than the governor could at *Fort Marlborough*, in *September* 1759. The third concealment is, that he did not diſcloſe the letter from Mr. *Winch* of the 4th of *February* 1759, mentioning the deſign of the *French* the year before. What that letter was; how he mentioned the deſign; or upon what authority he mentioned it; or by whom the deſign was ſuppoſed to be imagined, does not appear. The defendant has had every opportunity of diſcovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpoſe. The plaintiff offered to read the account *Winch* wrote to the *Eaſt India* Company, which was objected to; and therefore, it was not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the ſtrongeſt light, it is a report of a deſign to ſurprize the year before; but then dropt. This is a topic of mere general ſpeculation, which made no part of the fact of the caſe upon which the inſurance was to be made. It was ſaid, if a man inſured a ſhip, knowing that two privateers were lying in her way, without mentioning that circumſtance, it would be a fraud. I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumſtance: becauſe it does not follow that they will cruiſe this year, at the ſame time, in the ſame place; or that they are in a condition to do it. If the circumſtance of this *deſign laid aſide* had been mentioned, it would have tended rather to leſſen the riſk, than encreaſe it: for the deſign of a ſurprize, which has tranſpired, and been laid aſide, is leſs likely to be taken up again; eſpecially by a vanquiſhed enemy. The jury conſidered the nature of the governor's ſilence as to theſe particulars; they thought it innocent, and that the omiſſion to mention them, did not vary the contract. And we are all of opinion, that, in this reſpect, they judged extremely right. There is a ſilence, not objected to at the trial, nor upon this motion; which might, with as much reaſon, have been objected to, as the two laſt omiſſions; rather

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more. It appears by the governor's letter to the plaintiff, that he was principally apprehenſive of a *Dutch* war. He certainly had, what he thought, good grounds for this apprehenſion. *Comte D'Eſtaigne* being piloted by the *Dutch*, delivering the [192] fort to the *Dutch*, and ſending the priſoners to *Batavia*, is a confirmation of thoſe grounds. Probably, the loſs of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots: and it is plain, the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*. The reaſon why the counſel have not objected to his not diſcloſing the grounds of this apprehenſion is, becauſe it muſt have ariſen from political ſpeculation, and general intelligence: therefore, they agree, it is not neceſſary to communicate ſuch things to an underwriter.

"Laſtly, Great ſtreſs was laid upon the opinion of the broker. But we all think, the jury ought not to pay the leaſt regard to it: it is mere opinion; which is not evidence: it is opinion after an event: it is opinion without the leaſt foundation from any previous precedent or uſage: it is an opinion, which, if rightly formed, could only be drawn from the ſame premiſſes, from which the court and jury were to determine the cauſe: and therefore, it is improper and irrelevant in the mouth of a witneſs. There is no imputation upon the governor, as to any intention of fraud. By the ſame conveyance, which brought his orders to inſure, he wrote to the company every thing, which he knew or ſuſpected: he deſired nothing to be kept a ſecret, which he wrote either to them or his brother. His ſubſequent conduct, down to the 8th of *February* 1760, ſhewed that he thought the danger very improbable. The reaſon of the rule againſt concealments is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail, in the preſent inſtance, the rule would be turned into an inſtrument of fraud. The underwriter here, knowing the governor to be acquainted with the ſtate of the place; knowing that he apprehended danger, and muſt have ſome ground for his apprehenſion; being told nothing of either, ſigned this policy without aſking a queſtion. If the objection, "that he was not told,"

told," is ſufficient to vacate it, he took the premium, know- CHAP. X.
ing the policy to be void, in order to gain if the alternative turned out one way; and to make no ſatisfaction, if it turned out the other: he drew the governor, into a falſe confidence, that if the worſt ſhould happen, he had provided againſt total ruin; knowing, at the ſame time, that the indemnity, to which the governor truſted, was void. There was not a word [193]
ſaid to him of the affairs of *India*, or the ſtate of the war there, or the condition of *Fort Marlborough*. If he thought that omiſſion an objection, at the time, he ought not to have ſigned the policy, with a ſecret reſerve in his own mind to make it void: if he diſpenſed with the information, and did not think this ſilence an objection then; he cannot take it up now, after the event. What has been often ſaid of the ſtatute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud: "that it ſhould never be ſo turned, conſtrued, or uſed, as to "protect, or be a means of fraud." After the fulleſt deliberation, we are all clear that the verdict is well founded; and that there ought not to be a new trial: conſequently, that the rule obtained for that purpoſe ought to be diſcharged."

To have given this very elaborate and learned argument in the ſtate in which it was delivered, certainly requires no apology; becauſe from it may be collected all the general principles, upon which the doctrine of concealments, in matters of inſurance, is founded, as well as all the exceptions, which can be made to the generality of thoſe principles. To have abridged ſuch an argument, would have very much leſſened the pleaſure of the reader, and would have been an injury to the venerable judge, who in that form delivered the opinion of the court. The rules, then advanced and illuſtrated, have ſince been confirmed by the opinion of the judges upon ſimilar queſtions.

The plaintiffs, *Planché* and *Jaquery*, merchants in *London*, inſured goods, "on board the *Swediſh* ſhip called the *Mary* "*Magdalena*, loſt or not loſt, at and from *London* and *Ramſ-* "*gate* to *Nantz*, with liberty to call at *Oſtend*, being a general "ſhip in the port of *London* for *Nantz*." There was a declara- Planché and another v. Fletcher, Dougl. 238.

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tion in the policy, "that the insurance was made on account "of certain persons carrying on trade under the name and firm "of *Vallee* and *Duplessis*, Monsieur *Lassau le Jeune*, *Guillaume* "*Albert*, *et Poitier de la Gueule*." The defendant underwrote the policy for 300 *l.* at three guineas *per cent.* The ship's clearances from the custom-house in *London* and her other papers, were all made out for *Ostend* only, but the ship and goods were intended to go directly from *London* to *Nantz*, without

[194] going to *Ostend*. Bills of lading in the *French* language, dated the 18th of *July* 1778, were signed by the captain in *London*, but purporting to be made at *Ostend*, and that the goods were shipped there to be delivered at *Nantz*. The policy was subscribed by the defendant on the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *August*. The proclamation, for making reprisals on *French* ships, bore date the 29th, and appeared in the Gazette on the 31st of *July*. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas: one on the 31st of *July*, and the other on the 7th of *August*. The ship sailed on the 24th of *August*, and was taken by a king's cutter, on her way to *Nantz*. After her departure from *Gravesend*, the captain threw overboard all the papers which he had received from the Custom-house at *London*. They had been obliterated by the Custom-house officers at *Gravesend*, and were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiffs had no connection or share in the ship. Such were the material facts in this case as they were stated this day by lord *Mansfield* in his report, upon a rule to shew cause why there should not be a new trial.

Sittings after Trin. 1779.

The cause had been tried at the last sittings at *Guildhall*, and a verdict found for the plaintiff. The grounds for the application for a new trial were two: 1st, That there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, and yet never having been designed for that place. 2dly, That as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion, whether he would chuse for a peace premium to run the risk of capture. Beside the facts abovementioned, his lordship stated, that

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the plaintiff had produced evidence to ſhew, that all ſhips, going with goods of *Britiſh* manufacture to *France*, clear out for *Oſtend*, without meaning to go thither; and that this is univerſally underſtood by perſons concerned in that branch of commerce. The reaſons ſuggeſted for clearing out for *Oſtend*, and afterwards making bills of lading as from that place, were, that the light-houſe duties are ſaved, which are payable when the voyage is known to be directly down the channel: and that the *French* duties are leſs upon goods from *Oſtend*, than from *England*.

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Lord *Mansfield*.—" This verdict is impeached upon two grounds. 1ſt, It is ſaid there was a fraud on the underwriters, in clearing out the ſhip for *Oſtend*, when ſhe was never intended to go thither. But I think there was no fraud on them: perhaps, not on any body. What had been practiſed in this caſe was proved to be the conſtant courſe of the trade; and notoriouſly ſo to every body. The reaſon for clearing for *Oſtend*, and ſigning bills of lading as from thence, did not fully appear. But it was gueſſed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the ſame on ours; and it may be the intereſt of the farmers to connive at the importation of *Engliſh* commodities, and take *Oſtend* duties, rather than ſtop the trade, by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evaſion of the light-houſe duties, the ſhip was not liable to confiſcation on that account. 2d, The ſecond objection is, that the policy was made before, and the ſhip ſailed after, the proclamation for repriſals. But every man in *England* and *France*, on the 17th of *July*, expected the immediate commencement of a war. I will not ſay it was actually commenced; but the ambaſſadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets were at ſea; and, as it appeared afterwards, were waiting for each other to fight. It does not appear that the goods were *French* property; an *Engliſhman* might be ſending his goods to *France* in a neutral ſhip. But it is indifferent

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whether they were *Engliſh* or *French*. The riſk inſured extends to all captures, and as two other underwriters ſigned at the ſame premium, after the proclamation, it appears that the war riſk was in view when the defendant ſigned. Shall he avail himſelf of an event, which encreaſes the riſk, but which he had in contemplation when he underwrote the policy? I am of opinion, that there ſhould not be a new trial." The three other judges concurred; and the rule was diſcharged.

Mayne v. Walter, B. R. Eaſt. 22 Geo. III.

A ſimilar deciſion was made in the following caſe. It was an action on a policy of inſurance on a *Portugueze* ſhip, at and from *Madeira* to her port of diſcharge in *Jamaica*, with liberty to touch at the *Leeward Iſlands*. The defendant underwrote 150 *l.* upon it: the ſhip was captured by a *French* privateer, and condemned in the court of Admiralty in *France*, on the ground of having an *Engliſh ſupercargo* on board. The action was brought to recover this loſs from the underwriter, who refuſed to pay, alledging, that the plaintiff ſhould have diſcloſed to him, that the ſupercargo was *Engliſh*. At the trial, a verdict was given for the plaintiff, upon a caſe reſerved for the opinion of the court, and containing in ſubſtance the facts juſt ſtated.

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For the defendant it was inſiſted, upon the argument, that the agent for the inſured ought to have diſcloſed this fact; and that it was the more material in this caſe, becauſe during the preſent war, an ordinance paſſed in *France*, ſimilar to one made in the laſt war in 1756, which declares, that no *Dutch* ſhip ſhall be allowed to take on board a ſupercargo, belonging to any nation at enmity with the court of *France*: and that if any ſhip, having ſuch ſupercargo, be taken, it ſhall be condemned as lawful prize.

Lord *Mansfield*.—"It is an oppreſſive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter muſt run all riſks; and if the defendant knew of ſuch an edict, it was his duty to enquire, if ſuch a ſupercargo were on board. It muſt be a fraudulent concealment of circumſtances, that will vitiate a policy. But

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it is remarkable, that neither party has ſaid a word, reſpecting the treaties between *France* and *Portugal*." Judgment was accordingly given for the plaintiff.

3d, We come now to the third great diviſion of this chapter, namely, to caſes in which policies are void by miſrepreſentation. Before we proceed to ſtate the caſes under this head, it will be proper to diſtinguiſh between a warranty and a repreſentation. A warranty or condition is that, which makes a part of the written policy, and muſt be literally and ſtrictly performed; and being a part of the agreement, nothing *tantamount* will do, or anſwer the purpoſe. A repreſentation is a ſtate of the caſe, not a part of the written inſtrument, but collateral to it, and entirely independent of it; and it is ſufficient, that a repreſentation be ſubſtantially performed. The conſequence of a breach of a warranty we ſhall take notice of hereafter. If there be a miſrepreſentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written inſtructions, if they are not inſerted in the policy, are only to be conſidered as repreſentations; and in order to make them valid and binding as a warranty, it is abſolutely neceſſary to make them a part of the inſtrument, by which the contract of indemnity is effected. If a repreſentation be falſe in any material point, it will avoid the policy; and if the point be not material, the repreſentation can hardly ever be fraudulent. The principle upon which the policy is void in ſuch a caſe, we ſtated in the opening; that the underwriter has computed the riſk upon circumſtances, which were falſe, or which did not exiſt. Theſe doctrines are fully eſtabliſhed by a variety of judicial deciſions.

Vide poſt, c. 18.

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Upon a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows. "This was an action upon a policy of inſurance. At the trial it appeared in evidence, that the firſt underwriter had the following inſtruction ſhewn to him: "Three thouſand five hundred "pounds upon the ſhip *Julius Cæſar*, for *Halifax*, to touch at "*Plymouth*, and any port in *America; ſhe mounts twelve guns* "*and twenty men*." Theſe inſtructions were not aſked for,

Pawſon v. Watſon, Cowper 785.

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for it is equally falſe to undertake to ſay that, which he knows nothing at all of, as to ſay, *that* is true, which he knows is not true. But if he only ſay, "he believes the man to be in good "health," knowing nothing about it, nor having any reaſon to believe the contrary; there, though the perſon is not in good health, it will not avoid the policy, becauſe the underwriter *then* takes the riſk upon himſelf. So that there cannot be a clearer diſtinction, than that which exiſts between a warranty, which makes part of the written policy, and a collateral repreſentation, which, if falſe in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the uſage being to conſider inſtructions as a part of the policy, that parol inſtructions were never entered in a book, nor written inſtructions kept, till a few years ago, upon occaſion of ſeveral actions brought by the inſured upon policies, where the brokers had repreſented many things they ought not to have repreſented, in conſequence of which the plaintiffs were caſt. I adviſed the inſured to bring an action againſt the brokers, which they did, and recovered in ſeveral inſtances: and I have repeatedly at *Guildhall*, cautioned [200] and recommended it to the brokers, to enter all repreſentations made by them in a book. That advice has been followed in *London*; but it appeared lately, at the trial of a cauſe, that at *Briſtol*, to this hour, they make no entry in their books, or keep any inſtructions. The queſtion then is, whether in this policy the perſon inſuring has warranted that the ſhip ſhould poſitively and literally have 12 *carriage guns and* 20 *men?* That is, whether the inſtructions given in evidence are a part of the policy? Now I will take it by degrees. The two firſt underwriters before the court are *Watſon* and *Snell*. Says *Watſon*, "it is "part of my agreement, that the ſhip ſhall ſail with 12 guns, "and 20 men: and it is ſo ſtipulated, that nothing under that "number will do: ten guns with ſwivels will not do." The anſwer to this is, read your agreement; read your policy. There is no ſuch thing to be found there. It is replied, yes, but in fact there is, for the inſtructions, upon which the policy was made, contain that expreſs ſtipulation. The anſwer again is, there never were any inſtructions ſhewn to *Watſon*; nor were any aſked for by him. What colour then has he to ſay

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that thoſe inſtructions are any part of his agreement? It is ſaid, he inſured upon the credit of the firſt underwriter. A repreſentation to the firſt underwriter has nothing to do with that, which is the agreement, or terms of the policy. No man who underwrites a policy, ſubſcribes by the act of underwriting, to terms of which he knows nothing: but he reads the agreement, and is governed by that. Matters of intelligence, ſuch as that a ſhip is or is not miſſing, are things in which a man is guided by the name of a firſt underwriter, who is a good man, and to which another will therefore give faith and credit: but not to a collateral agreement, of which he can know nothing. The abſurdity is too glaring, it cannot be. By extenſion of an equitable relief in caſes of fraud, if a man is a knave with reſpect to a firſt underwriter, and makes a falſe repreſentation to him in a point that is material; as where having notice of a ſhip being loſt, he ſays ſhe was ſafe; that ſhall affect the policy with regard to all the ſubſequent underwriters, who are preſumed to follow the firſt. How then do *Watſon* and *Snell* underwrite the ſhip in queſtion? Without knowing whether ſhe had any force at all. *That* proves the riſk was equal to a ſhip of no force at all; and the premium was a vaſt one; eight guineas. So much therefore for thoſe two caſes. [201]
The third caſe is that of *Ewer*, who ſaw the inſtructions, with the repreſentation, which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have ſaid, put them into the policy; warrant that the ſhip ſhall depart with 12 guns and 20 men. Whereas he does no ſuch thing, but takes the ſame premium, which *Watſon* and *Snell* did, who had *no* notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ſhip of no force at all. The repreſentation amounts to no more than this, I tell you what the force will be, becauſe it is ſo much the better for you. There is no fraud in it, becauſe it is a repreſentation only of what, in the then ſtate of the ſhip, they thought would be the truth. And in real truth the ſhip ſailed with a larger force; for ſhe had nine carriage guns and ſix ſwivels. The underwriters therefore had the advantage by the difference. There was no ſtipulation about what the weight of metal would be. All the

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witneſſes ſay, that ſhe had more force than if ſhe had 12 carriage guns, in point of ſtrength, of convenience, and for the purpoſe of reſiſtance. The ſupercargo in particular ſays, "he "inſured the ſame ſhip and the ſame voyage, for the ſame "premium, without ſaying a ſyllable about the force." Why then it was a matter proper for the jury to ſay, whether the repreſentation was falſe, or whether it was in fact an inſurance as of a ſhip without force. They have determined, and I think very rightly, that it was an inſurance without force. *Ewer* makes an objection, that the repreſentation ought to be conſidered as inſerted in the policy; but the anſwer to that is, he has determined whether it ſhould be inſerted in the policy or not, by not inſerting it himſelf. There is a great difference, whether it ſhall be conſidered as a fraud. But it would be very dangerous to permit all collateral repreſentations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. *Thornton* has paid, who was the firſt perſon that ſaw the inſtructions. Shall the reſt refuſe then? As to *Watſon* and *Snell*, they have no pretence to refuſe; for there is not a colour for the objection made by them. As to *Ewer*, we are all ſatisfied with the determination
[202] of the jury againſt him. Therefore the rule for a new trial muſt be diſcharged."

N. B. On the *Monday* following, Mr. *Davenport* ſaid, he was deſired by the underwriters to aſk, whether it was the opinion of the court, that to make written inſtructions valid and binding as a warranty they muſt be inſerted in the policy? Lord *Mansfield* anſwered, that moſt undoubtedly that was the opinion of the court: If a man warrant that a ſhip ſhall depart with 12 guns, and it depart with 10 only, it is contrary to the condition of the policy.

From the judgment pronounced in the cauſe juſt ſtated, we learn the difference between a warranty and a repreſentation: we learn alſo, that a performance in ſubſtance will ſatisfy a condition expreſſed in a repreſentation; but that nothing except a ſtrict and literal compliance will fulfil the terms of the former: and we alſo are inſtructed in the whole doctrine of repre-

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repreſentation, as far as it affects the contract of inſurance. The poſitions advanced in the above caſe were ſo ſatisfactory, that they have been adopted, as the ground of direction to juries, upon all queſtions of repreſentation; and have been followed by the court, whenever points of that nature have come before them for judgment.

Bize v. Fletcher, Sittings after Eaſter Term 1779, Guildhall, Doug. Rep. 272.

This was an action on a policy of inſurance on the ſhip *Carnatic Eaſt Indiaman*, "at and from *Port l'Orient*, to the iſles "of *France* and *Bourbon*, and to all or any ports or places, "where, and whatſoever, in the *Eaſt Indies*, *China*, *Perſia*, or "elſewhere, beyond the *Cape of Good Hope*, from place to "place; and during the ſhip's ſtay and trade, backwards and "forwards, at all ports and places, and until her ſafe arrival "back at her laſt port of diſcharge in *France*." But at the ſame time that this policy was ſubſcribed, there was a ſlip of paper wafered to it, and ſhewn to the underwriters, on which was written the following repreſentation: "The ſhip has had "a complete repair, and is now a fine and good veſſel, three "decks. Intends to ſail in *September* or *October* next (1776). "Is to go to *Madeira*, the iſles of *France*, *Pondicherry*, *China*, "the iſles of *France*, and *L'Orient*."

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The ſhip did not ſail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *Auguſt* following, when, inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where having paſſed the winter and undergone conſiderable repairs, ſhe ſailed from thence early in the year 1778, (being the ſecond ſhip that left the *Ganges*); returned to *Pondicherry*, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year, by the *Mentor* privateer. The uſual time, in which the direct voyage between *Pondicherry* and *Bengal* is performed, is ſix or ſeven days; but the *Carnatic* was about ſix weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, ſhe either touched at, or lay off *Madras*, *Maſulipatam*, *Viſigapatam*, and *Yanon*, and took in goods at all thoſe places.

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It was contended in this cauſe, at the trial, that the repreſentation accompanying the policy reſtrained the voyage to the limits therein ſpecified. They produced ſome letters from the owners to their correſpondents, one of which was to the following effect: "We doubt not, but on account of the ſtorm, "the ſhip will be forced to go to *Bengal* to be laid down, which "cannot be done at *Pondicherry*; in which caſe, our captain "will have entered a proteſt, which we will forward in time "to you." In a ſubſequent letter, they ſay nothing of the ſtorm or leak; but mention a different cauſe for the ſhip's going to *Bengal*. Theſe letters, it was ſaid, raiſed a preſumption, that the neceſſity of going to *Bengal* was merely a pretence deviſed after the capture, and when the inſured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord *Mansfield* told the jury, "that the firſt queſtion was, whether the policy was void, on account of miſrepreſentation. Now there is an eſſential difference between a warranty, and a repreſentation. The warranty is a part of the contract: a riſk deſcribed in the policy is part of the contract. There can be no warranty by any collateral repreſentation. The ground, on which a repreſentation affects a policy, is fraud. The repreſentation muſt be fraudulent, that is, it muſt be falſe and
[204] material in reſpect to the riſk to be run. All riſks are governed by the nature of them; and the premium is governed by the riſk. Where a repreſentation accompanies an inſtrument, it ſays, "I will have this underſtood as my preſent intention: "but I will have it in my power to vary it." The great queſtion in this cauſe is, whether the repreſentation was falſe, and that in a material inſtance. Fraud is found out by the materiality of the point it is charged in. It is to be conſidered then, whether they had really a view of going to *China*. A witneſs has proved that the difference of inſurance is one *per cent.* on going to *Bengal*, and not to *China*. If you think that this was a miſrepreſentation to avoid paying the one *per cent.* you will find for the defendant. But if you are ſatisfied that the real intention, at the time of the repreſentation, was to go to *China*, the plaintiff will be entitled to your verdict:

dict: for the insured may change his intention, go to *Bengal*, and yet be protected by the policy, which clearly admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. If, upon the whole evidence, you shall be of opinion, that no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the underwriters, *this slip of paper being only a representation*, you must find for the plaintiff." The jury found a verdict accordingly. And although in several causes upon the same ship, new trials were moved for, and granted; yet in this, which was the only cause, in which there was a representation, the verdict was acquiesced in, and no motion respecting it ever was made.

Vide Doug. Rep. 271.

In the outset of this chapter, we took notice of a very material rule respecting misrepresentation; and which it now becomes necessary to repeat. If a representation be made to the underwriter of any circumstance, which was false, this, if it be in a material point, shall vacate the policy, and annul the contract, *although it happen by mistake*, and without any fraudulent intention, or improper motive on the part of the insured. We also stated the principle, on which, in such a case, the contract is held to be void: because the insurer is led into error, and computes his risk upon circumstances not founded in fact; by which means, the risk actually run is different from that intended to be run, at the time the contract is made. On this ground it is, that the contract is as much at an end, as if there had been a wilful and false allegation, or an undue concealment of circumstances. The doctrine here meant to be advanced will be better understood, and more fully illustrated, by attention to the following case:

5 Burr. 1909.

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It was an action on a policy of insurance on the ship, "the *Mary* and *Hannah*, from *New-York* to *Philadelphia*." At the time when the insurance was made, which was in *London*, on the 30th of *January*, the broker represented the situation of the

Macdowall v. Fraser, Doug. 247.

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the ſhip to the underwriter as follows: "The *Mary* and *Hannah*, a tight veſſel, ſailed with ſeveral armed ſhips, and was "ſeen ſafe in the *Delaware on the 11th of December*, by a ſhip "which arrived at *New York*." In fact the ſhip was loſt on *the 9th of December*, by running againſt a *cheveau de friſe*, placed acroſs the river. The cauſe came on to be tried before Lord *Mansfield* at *Guildhall*. The defence was founded on the miſrepreſentation as to the time when the ſhip was ſeen; and the repreſentation and the day of the loſs being proved, the jury found for the defendant. A rule was obtained on the part of the plaintiff, calling upon the defendant to ſhew cauſe why there ſhould not be a new trial. After argument at the bar,

Lord *Mansfield* ſaid: "The diſtinction between a warranty and a repreſentation is perfectly well ſettled. A repreſentation muſt be fair and true. It ſhould be true as to all that the inſured knows; and, if he repreſents facts to the underwriter, without knowing the truth, he takes the riſk upon himſelf. But the difference between the fact as it turns out, and as repreſented, muſt be material. The caſe of the *Julius Cæſar* was very different from this. The ſhip there was only fitting out, when the inſurance was made. No guns nor men were put on board. It was only ſaid, what was meant to be done; and what was done, though different, was as advantageous, or more ſo, than what had been repreſented. There was no evidence of *actual fraud* in the preſent caſe, and no queſtion of that ſort ſeemed to be made. But there was a poſitive averment, that the ſhip was ſeen in the *Delaware* on the 11th of *December*. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial *when* ſhe was ſeen in the *Delaware*, or in what condition: but ſuppoſe the fact had been explained in the manner now ſuggeſted, why did the inſured take upon him to compute the day of the month, on which ſhe had been ſeen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In inſurances on ſhips at a great diſtance, their being ſafe up to a certain day is always conſidered as a very important circumſtance. I am

Vide ante, the Caſe of Pawſon v. Watſon, P. 197.

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of opinion, that the repreſentation concerning the day was material."

Mr. Juſtice *Willes*.—" This is certainly only a repreſentation; but, in an inſurance on ſo ſhort a voyage, it might have made a material difference whether the ſhip was known to be ſafe two days ſooner or later. It ought to have been ſhewn, on the part of the plaintiff, that it was not material, but there was no evidence that the ſhip was met on the 9th, or any other day. The materiality was proper for the conſideration of the jury."

Mr. Juſtice *Aſhhurſt*.—"The diſtinction, which the court has made in the caſes on the *Julius Cæſar*, and ſome others, between a repreſentation, and a warranty, is extremely juſt. There is *no imputation of fraud* in this caſe; but the inſured ſhould have been more cautious. In the former caſes, the repreſentation was of what was intended; here it was of a fact ſtated as having happened, within the knowledge of the inſured. He ſhould have made the repreſentation in the ſame words, in which the intelligence is ſaid to have been communicated to him."

Mr. Juſtice *Buller*.—" We cannot ſay the difference of the day was not material. The ſafety of the ſhip is the moſt material fact of any, in caſes of inſurance. The plaintiff admits that the place where ſhe was met in ſafety, was material. Why was not the time equally ſo? There was no *intentional deceit*, and it is perhaps unfortunate that the inſured made *the miſtake*; but I think the verdict right."

A ſimilar deciſion was made by the ſame learned judges at a period ſubſequent to that of the caſe of *Macdowall* and *Fraſer*. [207] Shirley v. Wilkinſon, B. R. Mich. 22 Geo. III Doug. Rep. 2d edit. 293.

Upon a motion for a new trial, Lord *Mansfield* and the reſt of the court were clearly of opinion, that if the broker, at the time when the policy is effected, in repreſenting to the underwriter the ſtate of the ſhip, and the laſt intelligence concerning her, does not diſcloſe the whole, and what he *conceals* ſhall appear

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pear *material* to the jury, they ought to find for the underwriter, the contract in ſuch caſe being void; although the concealment ſhould have been *innocent*, the facts not mentioned having appeared *immaterial* to the broker, and having not been communicated merely on that account.

But as has been ſaid before, and as will appear from the caſes already cited, in order to vitiate the contract, the thing concealed muſt be *material*, it muſt be *ſome fact*, and not merely a ſuppoſition or ſpeculation of the inſured; and the underwriter muſt take advantage of any miſrepreſentation the firſt opportunity, otherwiſe he will not be allowed to claim any benefit from it at a future period. If therefore the inſured merely repreſent that he *expects* a thing to be done, the contract will not be void, although the event ſhould turn out very different from his expectation.

Barber v. Fletcher, Doug. 292.

Thus upon a motion for a new trial, one of the grounds ſtated to induce the court to grant it was, that ſince the trial, a material repreſentation, which had been made to *Shulbred*, the firſt underwriter upon the policy, and which turned out to be falſe, had been diſcovered. *Shulbred* made an affidavit, by which it appeared, that when he ſigned the policy in *March* 1778, the broker was getting ſeveral others, on other ſhips, ſubſcribed at the ſame time, all belonging to the ſame owner, and ſaid, ſpeaking of them all—"which veſſels are *expected* to "leave the coaſt of *Africa* in *November* or *December* 1777." In truth, the veſſel in queſtion had ſailed in *May* 1777, and *Shulbred* ſwore, that, if he had known that circumſtance, he would not have ſigned. There had been actions brought againſt all the underwriters on the policy, except *Shulbred*.

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Lord *Mansfield*.—"It has certainly been determined in a variety of caſes, that a repreſentation to the firſt underwriter extends to the others. But under what circumſtances has the defendant gone to trial in this caſe? he certainly knew what had been repreſented to himſelf. He was acquainted with *Shulbred*, and had an opportunity of aſking before the trial what had been repreſented to *him*. If therefore this evidence is new,

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it is owing to his own negligence. But the repreſentation is not material; it was only an *expectation*, and the underwriters did not enquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict ſhould be for the plaintiff." The rule was diſcharged.

There is another rule upon this ſubject, which it is material *particularly* to mention; although it may be collected from almoſt all the caſes, that have already been quoted: and it is applicable to each of the three branches, into which this chapter has been divided. Wherever there has been an allegation of a falſhood, a concealment of circumſtances, or a miſrepreſentation, it is immaterial, whether ſuch allegation or concealment be the act of the perſon himſelf who is intereſted, or of his agent; for in either caſe, the contract is founded in deception, and the policy is conſequently void. The reaſon of this rule is nothing more than that, which the law of *England* has for general convenience adopted, in treating of the relation between maſter and ſervant; declaring, that the maſter muſt always be reſponſible for the act of his ſervant, if done by his *expreſs* or *implied* command. It would indeed be of very miſchievous conſequence, if a man might ſhelter himſelf from reſponſibility of any kind, by throwing the blame upon his agent: it would be to allow him to contradict a maxim of law, which ſays, that no man ſhall be ſuffered to make any advantage of his own wrong: and would overturn that wiſe principle of equity, that when one of two innocent perſons (for the maſter may without danger to the argument be ſuppoſed innocent) muſt ſuffer by the fraud or negligence of a third, he, who gave credit to that third perſon, ſhall bear the conſequences ariſing from the confidence ſo repoſed. If this be true, and it cannot be denied, of contracts in general, it muſt alſo be admitted in thoſe of inſurance, where, from the very nature of the caſe, the buſineſs is ſeldom tranſacted by the parties themſelves; but is moſt commonly effected by the interpoſition of agents or brokers. The courts of juſtice have accordingly held, that any fraud in the agent of the inſured vitiates and annuls the contract, as much as direct fraud in the inſured himſelf:

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himſelf: and this, although the act cannot be traced at all to the owner of the property; or even though he ſhould be perfectly innocent.

Stewart and others v. Dunlop and others, H. Lords, det. Apr. 8, 1785.

In a caſe before the Houſe of Lords, ſo late as the year 1785, this doctrine was confirmed. It came before the Houſe on an appeal from the Court of Seſſions in *Scotland*, which had determined in favour of the reſpondents, the underwriters. The caſe was ſhortly this: a man having arrived at *Greenock*, knowing of the loſs of the ſhip inſured, and meeting a friend and intimate acquaintance of the inſured, and a partner with him in ſome other adventures, communicated the intelligence of the loſs of the ſhip to him, *who deſired it might be concealed*. The ſame day, as appeared by the evidence, the perſon, who had received this information, held a converſation with the plaintiff's clerk, who made this depoſition, "that neither at "that time, nor at any other time of the ſaid day, had he any "converſation whatever with the ſaid Mr. *Boog*, or meſſage "from him, either in writing or otherwiſe, relative to the "*Peggy* (the ſhip inſured), nor did he get *any hint* from him, "or any other perſon, relative to the making inſurance upon "her, further than the ſaid Mr. *Boog's aſking the deponent if he "knew whether there was any inſurance made upon her*, and if "there was any account of her." After this converſation, the plaintiff deſired the clerk to write to get an inſurance effected, which he did, without ſtating a word (at leaſt it did not appear that he ſtated any) of this converſation to his maſter. Upon the whole of the evidence in this cauſe, although it did not appear by any depoſition that the plaintiff knew of the loſs of the ſhip at the time he made the inſurance, the Lords of Seſſion decreed, "that the inſurance made by the plaintiff "would not have been made, if the brigantine *Henrietta* had "not arrived in the road of *Greenock* the day preceding, and "brought intelligence that the ſhip *Peggy* was taken; and "therefore that the policy was void." The Houſe of Lords confirmed this decree.

In the deciſions of the Houſe of Lords, the reaſons of the judgment never appear; and even when the learned judges

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give their opinions upon any cauſe then depending in that houſe, authentic reports of them are not eaſily obtained: the conſequence of this is, that one is frequently left to conjecture, upon what grounds the decree was pronounced. If we may be allowed to conjecture upon the caſe of *Stewart* v. *Dunlop*, it ſhould ſeem, that as no direct or poſitive act of knowledge was brought home to the plaintiff himſelf, the converſation which the clerk had with Mr. *Boog*, was held to be a ſufficient proof, that the loſs was known to him, at the time he wrote the letter, at the deſire of the plaintiff, ordering the inſurance. If known to the clerk, the act of the agent in ſuch a caſe becomes the act of the principal; becauſe the law, upon general reaſons of policy, will preſume, that the principal muſt know whatever has come to the knowledge of the agent.

But in the end of the ſame year, a caſe was decided in the King's Bench, expreſsly upon the point of fraud in the agent; for it appeared that the inſured was not guilty of any improper conduct in the tranſaction. In that caſe, the circumſtances were numerous; and the judges gave their opinions *ſeriatim* upon the queſtion.

It was an action on a policy of inſurance for 110*l.* under written by the defendant on the 21ſt of *September* 1782, at ſix guineas *per cent.* on a cargo of oats on board the ſhip *Joſeph*, loſt or not loſt, at and from *Hartland* to *Portſmouth*, beginning the adventure from the loading thereof on board the ſaid ſhip at *Hartland*. The defendant pleaded the general iſſue, and paid the premium into court. This cauſe came on to be tried before Mr. Juſtice *Buller* at *Guildhall*, when a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe: Fitzherbert v. Mather, 1 Term Rep. p. 13.

That on the 27th of *July* 1782, *William Bundock*, of *Pool*, agent for the plaintiff, contracted with *Richard Thomas* of *Hartland*, a corn factor, for the purchaſe of 500 quarters of oats, to be conſigned to *William Fuller*, at *Portſmouth*, on plaintiff's account; and deſired *Thomas* to ſend him (*Bundock*)

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a bill of lading and invoice, and alſo a like bill of lading and invoice to the plaintiff at Mr. *Fiſher*'s at the *Tower, London*. That in purſuance thereof, *Thomas* ſhipped the oats on board the ſhip inſured, which ſailed from *Hartland on the* 16*th of September* 1782, and was loſt *the ſame day* off the pier of *Hartland*. That on *the* 16*th of September* 1782, *Thomas* wrote the two following letters to *William Bundock*, and to *Fiſher*.

To Mr. WILLIAM BUNDOCK.

Sir, *Hartland, Sept.* 16th, 1782.

This morning I loaded the *Joſeph* with 175 quarters of oats to the addreſs of *William Fuller, Portſmouth, and the ſloop ſailed immediately*; but I am afraid the wind is coming to the weſtward, and will force her back. I have ſent a bill of loading, and a letter by the maſter to Mr. *Fuller*; and alſo a bill of loading, and advice to Mr. *Fiſher*, that *he may inſure*, if he likes, as the equinox is near, *&c.* R. THOMAS.

To CUTHBERT FISHER Eſq.

Sir, *Hartland, Sept.* 16th, 1782.

By an order from Mr. *William Bundock* of *Pool*, I ſhipped this day on board the *Joſeph*, which immediately ſet ſail for *Portſmouth*, a cargo of oats as under; and by the ſame order *as well as the order of Thomas Fitzherbert* Eſq. I took the liberty of drawing on you at three days ſight, in favour of Meſſrs. *Scott* and *Willes*, or order, 106*l.* to be placed to the account of *Thomas Fitzherbert* Eſq. *I wiſh the whole ſafe to hand*, and expect another veſſel to be loaded this week, weather permitting: this evening appears ſtormy.

R. THOMAS.

Then follows the bill of lading. The caſe further ſtates, that about *ſix* or *ſeven* o'clock of *the evening of the* 16*th of* September, Thomas *heard a report that the ſhip was on ſhore; and at ſix o'clock in the morning of the* 17*th he knew the ſhip was loſt*. That the mode of ſending letters from *Hartland* to *London*, is as follows: the letters are collected by a private hand about

about one or two o'clock of the day, on which the poſt ſets out from *Biddeford*, from which place it goes about nine o'clock in the evening. That the 16th of *September* was not a poſt day; *and the above letters did not leave* Hartland *till one o'clock in the afternoon of the* 17*th*, which was the poſt day from *Biddeford* to *London*: and the letters which went from *Biddeford* by the poſt of that evening, were received in *London* on the 20th of *September*. That on the 19th, the plaintiff wrote the following letter to *Fiſher*.

Stubb-Lodge, Portſmouth,
Sept. 19*th*, 1782.

Dear *Fiſher*,

My correſpondent, Mr. *Bundock*, having informed me, that he has ſent two ſloops to *Hartland* in *Devonſhire*, to load oats on my account and riſk, I beg the favour of you to inſure my amount of the cargoes to *Portſmouth*, as ſoon as the bills are ſent you. T. FITZHERBERT.

That the laſt mentioned letter, together with the former from *Thomas*, dated *September* 16th, were received by *Fiſher* in *London*, on the 20th of *September*; and he thereupon directed the inſurance in queſtion to be effected: that on the 21ſt, defendant ſubſcribed the policy. Upon this caſe, after argument at the bar,

Lord *Mansfield* ſaid: "this policy is effected by miſrepreſentation, and that miſrepreſentation ariſes *from the proper agent* of the plaintiff, who gives the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either caſe, the policy is void. As to the miſrepreſentation, the underwriter was warranted on the information of the agent to take for granted that the ſhip was ſafe at 12 or 1 o'clock of the 17th of *September*; for the agent gives an account of the ſhip being loaded, and ſays, "I wiſh the whole "ſafe to hand." Then there was ſtrong ground to believe on his letter, that ſhe was ſafe when the poſt came away; and the poſt-mark ſhews the day when the letters were ſent. How does this miſrepreſentation come? Why from *Thomas*, who

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writes to *Fiſher*, and gives him notice of the ſhip's ſailing, on purpoſe that he may inſure; for ſo he ſays expreſsly in his letter to *Bundock*. He was honeſt at the time he wrote the letter; but on the 16th, at night, he hears that the ſhip is gone aſhore, and the next morning he knew that ſhe was abſolutely loſt. The poſt did not go out till the afternoon of that day; and he had full opportunity to ſend an account of the loſs. If *Thomas* were not guilty of fraud, at leaſt he was guilty of groſs negligence: but either way, if *Thomas* were perfectly innocent, this policy, being effected by miſrepreſentation, is void."

Mr. Juſtice *Willes*.—"*Thomas* is moſt clearly to be conſidered as the agent of the plaintiff. He ſhews by his letter to *Fiſher*, that he acts as well by the orders of *Fitzherbert* as of *Bundock*. If then *Thomas* be the agent of the plaintiff, he is moſt certainly liable for his miſrepreſentations: and in this caſe the miſrepreſentation is groſs."

Mr. Juſtice *Aſhhurſt*.—"On principles of policy, it is neceſſary that a man ſhould be anſwerable for the acts of his agent. It is often difficult to prove the privity of knowledge; and therefore the law will preſume, that facts known to the one, are alſo within the knowledge of the other. Nor is there any hardſhip on the plaintiff; for if this fact had been known, the policy could not have been effected."

Mr. Juſtice *Buller*.—"In order to ſhew, that *Thomas* was not the agent of the plaintiff, the counſel has aſſumed a fact, which is contrary to the caſe; for it is ſaid, that the inſurance was not made in conſequence of *Thomas*'s letter. But what is the fact? The plaintiff's letter to *Fiſher* deſires him to inſure, as ſoon as the bills of lading are ſent. By whom were they to be ſent? By *Thomas*; then he refers to *Thomas* for all the information, and as the foundation of the inſurance. The plaintiff, I dare ſay, is innocent; and ſo is the defendant. But if the plaintiff build his information on that of his agent, and his agent be guilty of a miſrepreſentation, the principal muſt ſuffer. It is the common queſtion every day at *Guildhall*, when one

one of two innocent perſons muſt ſuffer by the fraud or negligence of a third, which of the two gave credit. In this caſe, the plaintiff truſted; not the defendant: *Thomas* had very material information, which he did not communicate; the conſequence of which is, that the policy is void, and the *poſtea* muſt be delivered to the defendant." CHAP. XX

From theſe caſes, the principle, which we ſought to eſtabliſh, is evident, *viz.* that whether the fraud or miſrepreſentation be the act of the inſured, or of his agent, the policy is void, and the contract between the parties is vacated and annulled.

To have troubled the reader with all the caſes that have come to trial upon the ground of fraud, would have ſwelled this chapter to the ſize of a volume; and at the ſame time would be wholly unneceſſary, as every caſe of fraud muſt depend upon its own circumſtances. It was thought ſufficient to lay down the general principles, which the courts have adopted upon the ſubject, and which are applicable to each diviſion of it as ſtated in the beginning of this chapter; and to cite two or three caſes under each head, in order to confirm and illuſtrate the poſitions and principles advanced.

But as fraud is a charge of a very ſerious nature, materially affecting a man's credit, character, and reputation, the law of *England* will never preſume that any one is guilty of it; nor ſet aſide a contract on that ground, unleſs it be *fully and ſatisfactorily* proved. The conſequence of this favourable preſumption is, that the burden of proof lies upon the perſon, who wiſhes to avail himſelf of the fraudulent conduct imputed. Thus if the inſured is ſuppoſed to be guilty of fraud, the proof of it falls upon the underwriter; becauſe he is the perſon, who is to derive a benefit from ſubſtantiating the charge. This is not only the law of *England*, but the law of common ſenſe, founded on principles of equity and juſtice. Although it has been ſaid, that fraud will not be preſumed, unleſs it be *fully and ſatisfactorily proved*, it is not intended to convey an idea, that there muſt be a *poſitive* and *direct* proof of fraud, in order to annul Roccus, Not. 51. 78.

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the contract. The nature of the thing itſelf, which is generally carried on in a ſecret and clandeſtine manner, does not admit of ſuch evidence; and therefore, if no proof but that of actual fraud were allowed in ſuch caſes, much miſchief and villainy would enſue, and paſs with impunity. Circumſtantial evidence is all that can be expected; and indeed, all that is neceſſary to ſubſtantiate ſuch a charge. The prejudice entertained againſt receiving circumſtantial evidence, is carried to a pitch wholly inexcuſable. In the caſe before us, we have already ſhewn, it muſt be received; becauſe the nature of the enquiry for the moſt part admits of no other, and conſequently it is the beſt poſſible evidence that can be given. But taking it in a more general ſenſe, a concurrence of circumſtances (which we muſt always ſuppoſe to be properly authenticated, otherwiſe they weigh nothing) forms a ſtronger ground of belief, than poſitive and direct teſtimony generally affords; eſpecially when unconfirmed by circumſtances. The reaſon of this is obvious: a poſitive allegation may be founded in miſtake or what is too common, in the perjury of the witneſs: but circumſtances cannot lie; and a long chain of well connected fabricated circumſtances, requires an ingenuity and ſkill rarely to be met with; and ſuch a conſiſtency in thoſe who come to ſupport thoſe circumſtances, by their oaths, as the annals of our courts of juſtice can ſeldom produce. Beſides, circumſtantial evidence is much more eaſily diſcuſſed, and much more eaſily contradicted by teſtimony, if falſe, than the poſitive and direct allegation of a fact, which, being confined to the knowledge of an individual, cannot poſſibly be the ſubject of contradiction founded merely on preſumption and probability.

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Another queſtion upon this ſubject remains to be diſcuſſed; and that is, whether the underwriter is bound to return the premium, or is liable to an action for it, in a caſe where fraud has been proved againſt the inſured; and conſequently where the contract is void, and no riſk has been run. The ordinances of *France* declare, that if fraud be proved againſt the inſured, he ſhall be obliged to reſtore to the inſurer that, which he has received from him, and alſo to pay him double the premium:

Ord. of Lew. 14. tit. Inſ. art. 41.

and

and if fraud be proved againſt the inſurer, he ſhall in like manner be liable to reſtore the premium, and to pay double the ſum inſured to the owner of the property. A learned commentator upon theſe ordinances obſerves, that if this article ſuppoſe a full conviction of the crime, the puniſhment is too ſmall; and that here the puniſhment of the aſſurer and aſſured is nearly equal, although the crime of the aſſured is much greater, when the difference between the premium, and the value of the property is conſidered. Indeed, the idea of enriching one man by the puniſhment of another is itſelf a ſtrange one; and ſomewhat inconſiſtent with the preſent notions of criminal juſtice. The ground upon which it has been introduced into the edicts of *France* upon inſurances, muſt have been this, that as the inſurer in one caſe, and the inſured in the other, runs a conſiderable riſk by fraudulent allegations or concealments, they ſhall ſeverally be entitled to the ſums ſtated in the ordinance, as a recompence for the riſk they ſo incurred.

2 Valin, 96.

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The law of *England* has hitherto been ſilent upon this ſubject, there being no poſitive declaration of the legiſlature reſpecting it: and our courts of juſtice had not till lately adopted any general rule, with reſpect to the return of premium in caſes of fraud. In two or three inſtances in the Court of Chancery, where the underwriters have been relieved from the payment of the ſums inſured on account of fraud, the decree has directed the premium to be returned.

Thus in a caſe in the year 1690, the defendant and others had come to the inſurance office, and bought a policy for inſuring the life of one *Horwell* (upon whoſe life they had no concern or intereſt depending) for a year; and the policy ran whether intereſted or not intereſted, at a premium of 5 *l. per cent.* They took this way of drawing in ſubſcribers: they agreed with one *Marwood*, a known merchant upon the Exchange, and a leading man in ſuch caſes, to ſubſcribe firſt; but in caſe *Horwell* died within the year, *Marwood* was to loſe nothing, but on the contrary was to ſhare what ſhould be gained from the other ſubſcribers. Upon the credit of *Marwood*'s ſubſcribing, ſeveral others (who had enquired of *Marwood*

Whittingham v. Thornborough, Precedents in Chancery, p. 20, and 2 Vern. 206.

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tooed about *Horwell*, who was his neighbour; ſubſcribed likewiſe. *Horwell* lived about four months, and then died; and this bill was brought to be relieved againſt the policy: and this matter being all confeſſed by the anſwer, the court decreed the policy to be delivered up, *and the premium to be repaid.*

Da Coſta v. Scandret, 2 P. Wil. 170. Vide ante, p. 179.

So alſo in the caſe of *Da Coſta* v. *Scandret*, which has already been cited in a former part of this chapter, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the inſured.

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It is true, that during the argument in the caſe next to be quoted, the counſel cited a caſe of *Rucker* v. *Hollingbury*, in which the Maſter of the Rolls had been of a different opinion from that delivered in the two preceding caſes. But Lord *Mansfield* ſaid, that there muſt be ſome miſtake in reciting the caſe before the Maſter of the Rolls: for the practice of the Court of Chancery was certainly agreeable to the two former caſes.

Wilſon v. Duckett, 3 Burr. 1361.

The caſe, in which this obſervation was made, was an action on a policy of inſurance on a ſhip, with a count of a general *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe: and damages were laid at 98 l. The trial was had, under a decree of the Court of Chancery, where the now defendant, the inſurer, being there complainant, *had offered to pay back the premium, which was* 10 *l.* No money was, in the preſent caſe, paid into court; though the uſual courſe in theſe caſes is for the defendant, the inſurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his uſe; although they were of opinion againſt the policy, upon the foot of fraud; and found againſt it, as being fraudulent. In fact, the firſt underwriter was only a decoy-duck, to induce other perſons to underwrite the policy; and it had been previouſly agreed between the inſured and him, that he ſhould not be bound by ſigning the policy; which this court conſidered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence

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sentence of Lord *Mansfield* (before whom this cause was tried) and of the counsel on both sides, it was agreed to bring this question before the court, whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff (the insured) or retained by the defendant (the insurer)? The cases abovementioned were quoted by the counsel for the plaintiff; but they being all in Chancery, Lord *Mansfield* said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, his lordship said, It was plain what must be done in this case; for he looked upon *the offer made* by the complainant's bill in equity, to be the same thing as if the money had *actually been brought into court* in the present case.

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But although the common law has been so silent upon the subject, as not to lay down any general rule; and although in all the cases stated, the premium was restored; yet if the fraud is notorious, palpable and gross in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Thus where an action was brought by the insured to recover 1300*l.* being the amount of the defendant's subscription; the ground of refusal was, that the insurance was fraudulent; and that the plaintiff knew of the loss of the ship at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one now in dispute; but contended that news of the loss of the ship had not arrived, till after this particular one was effected. The evidence, however, was so strong as easily to convince the jury, that the plaintiff had received information of the loss before the order for making the insurance was given to the broker; and they found a verdict for the defendant.

Tyler v. Horne, Sittings at Guildhall after Hil. T. 1785.

Lord *Mansfield* said, The fraud was so gross, that the premium should not be recovered from the underwriter.

At last this great question came to be expressly decided, where the agent of the assured only had been the guilty person; and the whole Court of King's Bench were of opinion, that

Chapman and others, Assignees of Kennet, v. Fraser, B. R. Trin. 33 Geo. III.

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that in all cases of *actual* fraud on the part of the assured or his agent, the underwriter might retain the premium.

It is proper also here to observe, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. Thus it was said by Lord *Mansfield*, in the case of *Carter* v. *Boehm*, which has already been quoted at large in this chapter: "the policy would be void against the "underwriter, if he concealed any thing; as, if he insured a "ship on her voyage, which he privately knew to be arrived; "and *an action would lie to recover the premium.*"

3 Burr. 1909.

By several of the foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe. By those of *Amsterdam* it is declared, "that as contracts of insurance "are contracts of good faith, wherein no fraud or deceit "ought to take place, in case it be found, that the insured or "insurers, captains, shippers, pilots, or others used fraud, de- "ceit or craft, they shall not only forfeit by their deceit and "craft, but shall also be liable to the loss and damage occa- "sioned thereby, and be corporally punished for a terror and "example to others; *even with death*, as pirates and manifest "thieves, if it be found that they have used notorious mal- "versation or craft." The ordinances of *Middleburg* contain a provision exactly in the same words. At *Stockholm* also, it has been declared, that such an offender, besides restitution to the party injured, shall, according to the circumstances of every particular affair, be punished in his estate, honour, and life.

Ord. of Amsterdam, art. 56. 2 Mag. 146.

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Art. 30. 2 Mag. 76. 2 Mag. 288.

Frauds in contracts of insurance have not as yet had any punishment affixed to them by the laws of *England*, that I have been able to learn: but there are one or two cases which have been declared to be felonies by positive statutes, where the act committed has been to the prejudice of the underwriters.

By a statute in the reign of queen *Anne*, it was enacted, that if any captain, master, mariner, or other officer, belonging to any ship, shall wilfully cast away, burn, or otherwise destroy, the

1 Ann. st. 2. c. 9. s. 4.

the ſhip, unto which he belongeth, or procure the ſame to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that ſhall load goods thereon, (or by a ſubſequent ſtatute, to the prejudice of any perſon or perſons that ſhall underwrite any policy or policies of inſurance thereon) ſhall ſuffer death as a felon; and the benefit of clergy is taken away from this offence by 11 *Geo.* I. *ch.* 29.

4 Geo. I. c. 12. ſ. 3.

Theſe are the only proviſions, which the legiſlature of this country has, as yet, thought proper to make for the prevention of crimes of this enormity: but as the records of our courts of juſtice evidently prove that frauds are too frequent in policies of inſurance, greater ſeverity than merely annulling the contract ſeems neceſſary, in order to put a ſtop to ſuch offences.

CHAPTER THE ELEVENTH.

Of Sea-worthineſs.

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HAVING in the preceding chapter treated very fully of the influence which fraud has upon the contract of inſurance; we proceed to ſhew, that other circumſtances, in which no fraud whatever can be diſcovered, or even ſuſpected, will alſo vitiate and annul the policy. Of this nature is the doctrine of Sea-Worthineſs. Upon this point it has been determined, that every ſhip inſured muſt, at the time of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen; and if ſhe have a latent defect wholly unknown to the parties, that will vacate the contract; and the inſurers are diſcharged. This doctrine is founded upon that general principle of inſurance law, that the inſurers ſhall not be reſponſible for any loſs ariſing from the inſufficient or defective quality or condition of the thing inſured.

There is in the contract of inſurance a tacit and implied agreement that every thing ſhall be in that ſtate and condition, in which it ought to be: and therefore it is not ſufficient for the inſured to ſay, that he did not know that the ſhip was not ſea-worthy; for he *ought* to know that ſhe was ſo, at the time he made the inſurance. The ſhip is the *ſubſtratum* of the contract between the parties; a ſhip not capable of performing the voyage is the ſame, as if there were no ſhip at all; and although the defect may not be known to the perſon inſured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter; becauſe ſuch a defect is not the conſequence of any external misfortune, or any unavoidable accident, ariſing from the perils of the ſea, or any other riſk, againſt which the underwriter engages to indemnify the perſon inſured. To ſupport a contrary doctrine would introduce a variety of frauds, as it would probably ſubject the underwriter to account for the loſs, diminution,

diminution, or waſte, which may happen from the neceſſary and ordinary uſe of the thing inſured; or the wear and tear of the ſhip in the common courſe of the voyage: and all of theſe are riſks, to which the inſurer has never been conſidered as expoſed. From what has been ſaid it appears, that the ground of deciſion in this caſe is perfectly diſtinct from any principle of fraud: that it depends merely upon this, that the inſured is preſumed to be better acquainted with the ſtate and condition of his ſhip than any other man; and that he has tacitly undertaken, that ſhe is in a condition to perform the deſtined voyage. In the cauſe of *Carter* v *Boehm*, which was decided in *Eaſter* term 1766, Lord *Mansfield*, in diſcourſing upon the caſe then before him, affirms the law reſpecting the neceſſity of a ſhip being ſea-worthy when ſhe is inſured: for he ſays, "The utmoſt that can be contended for "is, that the underwriter truſted to the *fort* being in the "condition in which *it ought* to be; *in like manner as it is* "*taken for granted, that a ſhip inſured is ſea-worthy.*" But although the inſured ought to know whether his ſhip was ſea-worthy or not at the time ſhe ſet out upon her voyage; yet he may not be able to know the condition ſhe may be in, after ſhe is out a twelvemonth: and therefore, whenever it can be made appear, that the decay, to which the loſs is attributable, did not commence till a period ſubſequent to the inſurance, as ſhe was ſea-worthy at the time, the underwriter, it is preſumed, would be liable. Indeed, in a late caſe upon another point, but where the ſame principle was much relied upon, Lord *Mansfield* ſaid, "By an implied warranty every ſhip "inſured muſt be tight, ſtaunch, and ſtrong: but it is ſuffi-"cient if ſhe be ſo at the time of her ſailing. She may "ceaſe to be ſo in twenty-four hours after departure, and "yet the underwriter will continue liable (*a*)." Every caſe of this kind, it is true, muſt depend upon its own circumſtances; but when they are once aſcertained, the rule of law

3 Burr. 1913.

5 Burr. 2804.

Eden v. Parkinſon, Doug. 732.

(*a*) But if a ſhip ſail upon a voyage, and in a day or two become leaky, and ſubmerſed, or is obliged to return to port without any ſtorm, or viſible or adequate cauſe to produce ſuch an effect, the preſumption is, that ſhe was not ſea-worthy when ſhe ſailed; and the jury, upon the plaintiff's own caſe, may draw ſuch a concluſion. *Munro and another* v. *Vandam*. Sittings at Guildhall before Lord Kenyon after Michaelmas Term 1794.

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is clear and decisive. The most material case upon this subject in the law of *England* is that of the *Mills* frigate, which underwent a variety of discussion in several courts, and in which all the principles on which this doctrine is founded were fully discussed. I have used my utmost endeavours to procure a copy of the opinions of the judges upon that case; but they have been ineffectual: therefore the reader must be satisfied with a full statement of the circumstances, as they appeared upon the demurrer to the evidence.

Before the proceedings in this case are stated, it will be necessary to mention, that an action had been brought in the court of Common Pleas on the same policy against one of the underwriters; and Lord *Camden*, who tried that cause, directed the
[222] jury to find a verdict for the plaintiff: but upon a motion for a new trial, his Lordship declared, that he had changed his opinion: and the whole court of Common Pleas laid down the principles above stated, and directed a new trial. Upon the second trial, Lord *Camden* stated to the jury the opinion he had formed upon the subject, and a verdict was accordingly given for the defendant, which, upon a subsequent application, the court of Common Pleas refused to set aside. The plaintiffs then commenced a new action in the court of Exchequer against another of the underwriters, and which is now the subject of our attention.

Mills and another v. Roebuck. In the Exchequ.

This was an action on a policy of insurance, lost or not lost, at and from the *Leeward Islands* to *London*, warranted to sail on or before the 26th of *July*, upon any kind of goods, wares, and merchandizes; and also upon the body, tackle, *&c.* of and in *the good ship or* vessel called the *Mills Frigate*, beginning the adventure on the goods from the loading thereof *on board* the said ship at *St. Kitt's*, and upon the ship *from her* arrival at the *Leeward Islands*. The defendant undertakes to indemnify against the usual risks, for a premium of 2 *l.* 10 *s. per cent.* The loss was described in the first count of the declaration in these words: "That the said ship, after her departure from *Nevis* on her "voyage, and during her said voyage, sailing and proceeding "on the high seas by and through the force of winds and tem-

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" peſtuous weather, and by and through the mere perils and " dangers of the ſeas, ſprang divers leaks, and became very lea- " ky, crippled, bulged, disjointed, ſplit, and wholly loſt." In the ſecond count the loſs is alledged thus: " by and through " the mere perils and dangers of the ſeas, and by the ſtarting " and looſening of one or more plank or planks of the ſaid ſhip, " and by accidentally ſpringing one or more leak or leaks, the " ſaid ſhip became very leaky, crippled, *&c.* and totally unable " to proceed on, or perform the ſaid voyage." There were two other counts in the declaration upon a policy on freight to recover from the underwriter the amount of his inſurance upon that alſo; and a fifth count for money had and received to the plaintiff's uſe. The defendant pleaded the general iſſue; and paid the premiums into court.

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This cauſe came on to be tried before Lord Chief Baron *Parker*; and the defendant demurred to the evidence produced on the part of the plaintiff. The demurrer follows in theſe words: Thereupon the ſaid *John* and *Thomas Mills* (the plaintiffs) ſhew in evidence to the jury to prove and maintain the iſſue within mentioned on their part, to wit, that the defendant underwrote the policy of inſurance, and that the plaintiffs were intereſted to the amount as in the declaration is mentioned: That the ſhip in queſtion was a *French*-built ſhip, and known to be ſo to the defendant at the time he underwrote the ſaid policy: That the timbers of *French* ſhips are uſually faſtened with iron bolts or ſpikes, which are liable to grow ruſty; and when the ſame are grown ruſty, the timbers of ſuch ſhips frequently become looſe at once, and the ſhips are rendered incapable of bearing the ſea, without any perceptible ſymptoms of decay: that the ſhip in queſtion was purchaſed by the plaintiffs in the year 1757; that ſince that time ſhe has been generally employed by the plaintiffs, who are *Weſt India* merchants, in that trade; and large ſums have conſtantly been inſured on her and her cargoes: that in *February* 1764, being bound to the *Leeward Iſlands*, and back again to *London*, ſhe ſailed on her voyage; that before ſhe ſailed from *London* on that voyage, the plaintiffs ordered the captain to have every thing done to the ſhip, which he ſhould think proper to repair her: That in purſuance

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of ſuch orders, the ſhip was put into dock and repaired, where the ſhip carpenter did all ſuch repairs to her as he was ordered, the expences of which amounted to about 100 *l.* of which about 30 *l.* was for the ſheathing and other repairs of her hull, and the reſidue in her upper works: that nothing more appeared to the ſhip carpenter, or the captain, to be wanting to make her fit and complete for the ſaid voyage; but her iron bolts and ſpikes were not then examined, which could not be done without taking off her ſheathing; an act never done where (as the caſe is here) the ſhip had been ſheathed a little time before: that *George Hayley* eſq. the firſt underwriter on this policy, and many other perſons by whom policies of inſurance are generally underwritten, keep a regiſter, in which all ſhips uſually inſured by them, are entered with an account of the age, conſtruction, and viſible goodneſs of the veſſels, and to whom they belong, and alſo employ a ſurveyor, whoſe buſineſs

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it is to ſurvey ſuch ſhips: that the ſhip in queſtion, at the time of underwriting the policy, and long before, had been entered in ſuch regiſter; and previous to her laſt outward-bound voyage, had been ſurveyed by one *Thomas Whitewood*, who was then employed by the ſaid *George Hayley*, and other underwriters, as ſuch ſurveyor; and as far as appeared to the ſaid *Thomas Whitewood*, was in good condition, and perfectly fit to undertake a voyage to and from the *Leeward Iſlands*; but the ſurveyor did not, neither could he, examine the bolts and ſpikes for the reaſons aforeſaid; but did ſurvey as far as is ever practiſed in ſuch caſes: that the ſaid *George Hayley* had often before underwrote policies on the ſaid ſhip and her cargoes; and the witneſs, who was the inſurance broker, ſaid he believed Mr. *Hayley* knew as much of the condition of the ſhip as the plaintiffs did, and particularly on the outward-bound voyage to the *Leeward Iſlands*, he underwrote 400 *l.* on this ſhip: that in ſuch laſt outward-bound voyage, the ſhip met with a great deal of bad weather; was very leaky, and could not get into *Madeira*, where ſhe was ordered to touch; but was obliged to bear away for the iſland of *Nevis*: that ſhe arrived at the iſland of *Nevis* on the firſt of *April* 1764, and from thence went to the iſland of *Saint Chriſtopher*, where ſhe delivered her outward-bound cargo, and had ſuch repairs done to her, as were then thought neceſſary, and

to all appearance put into a proper condition for her voyage home; but her bolts and ſpikes were not, nor could be examined there: that about the end of the ſaid month of *April*, the ſhip ſailed from *St. Kitt's* to *Nevis*, where the captain had been promiſed a loading for her home: that on her arrival at *Nevis*, the planters, knowing ſhe had been leaky in her outward-bound voyage, were not willing to put ſugars on board her; and that in order to ſatisfy the planters there, that ſhe was in a proper condition to carry a cargo of ſugars to *London*, they propoſed to the captain, as a meaſure which would be fully ſatisfactory to them, that he ſhould ſubmit the ſhip to be ſurveyed by all the captains then in the harbour, being ſix in number; and told him, that if they ſhould report her to be fit for a voyage to *London*, they would then load her with ſugars: that the captain did ſubmit to ſuch ſurvey, though it would have been for the intereſt of the ſaid captains to report the ſhip unfit for the voyage; as by that means they would have had an opportunity of gaining more freight and ſooner: that on the 8th day of *May* 1764, the ſaid captains, after having ſurveyed her carefully, but without examining her bolts and ſpikes, which could not be done, there ſigned the following report: "*Nevis*, "*May* 8th, 1764. At the requeſt of captain *George Finch*, "of the ſhip *Mills Frigate*, we the ſubſcribers did repair on "board the ſaid ſhip, and after due examination, it did appear "to us, that the occaſion of the ſhip's making more water than "uſual on her voyage from *London* to this place, was occa- "ſioned by ſome neglect in caulking the ſaid ſhip, which may "very eaſily be made tight, the ſaid ſhip otherwiſe appearing "to us to be ſtrong and ſound; and when caulked, we are of "opinion, will be fully ſufficient to carry a cargo of ſugars to "*London*, *John Shepherd*, *&c.*" That afterwards the ſhip was caulked according to the ſaid report, and that thereupon the planters ſent their ſugars on board, and the ſhip was ſoon loaded with about three hundred and ſeventy hogſheads of ſugar: that during the time of her loading, and until and at the time of her ſailing, which was about two months, the ſhip continued tight, appeared to be in good condition, and made no more water than the beſt ſhips uſually do, and are expected to do: that the ſhip ſailed from *Nevis* on the 26th

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day of *July* 1764, about eight o'clock in the evening, and the next day, about four o'clock in the afternoon, without any bad weather or extraordinary ſwell of the ſea, ſhe ſprang a leak, and the captain was obliged to bear away for *St. Chriſtopher's*, where he arrived on the 28th of *July*: that on his arrival there, he got the ſhip unloaded to ſee what was the matter with her, when it appeared that ſhe had ſtarted a plank; that he thereupon applied to the judge of the Court of Vice Admiralty for a warrant to ſurvey the ſhip; and a warrant was granted to four captains, and two ſhip carpenters, or any three of them; four of whom did, according to ſuch warrant, ſurvey the ſaid ſhip, and did report, that ſhe was unfit to proceed on her voyage without being thoroughly repaired: and that the expence of ſo repairing her there, would amount to more than the value of the ſhip and freight; and ſhe was therefore condemned by the ſaid court as unfit for the ſaid voyage: that ſome of the iron bolts and ſpikes, with which the timbers of the ſhip in queſtion, like other *French*-built ſhips, were faſtened, were broken in the plank that was ſo ſtarted,

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which the captain and the ſaid ſurveyors felt, by paſſing up their hands between the plank and the ſhip; and which appeared upon farther opening the ends of the plank; and that the ſaid plank was ſtarted from one end to the other: that it was owing to the ſaid bolts and ſpikes being grown ruſty and decayed, as then appeared to the captain and ſurveyors, that ſuch plank ſtarted: that he believed the ſurveyors, who condemned her, thought the ſame; wherefore, and ſuppoſing the other bolts and ſpikes in the ſhip were alſo grown ruſty and decayed, though that could not be known for certain, without ripping off her planks, and making a more ſtrict examination, the ſurveyors made their ſaid report of condemnation: that the ſaid plank was not taken off, nor could it be, without ſinking the ſhip, which has not yet been broken up, but continues at *St. Chriſtopher's* as a hulk: that on the aforeſaid account, it was then concluded, and is now believed by the captain, *that the ſaid ſhip was not fit for the inſured voyage* home, at the time ſhe ſo ſailed from *Nevis* for *London*, *though*, *to all outward appearance*, *ſhe was a very good ſhip*, *and*, as he then believed, *proper for the voyage*; and ſuch a ſhip as he, *from her outward appearance*,

appearance, ſhould have had no objection to ſail in again; but had he known the decayed condition of her ſaid bolts and ſpikes before he ſet ſail on his homeward-bound voyage, he would not have ventured his life in her: that there is no dock, nor ſcarce any materials for repairing ſhips at *St. Chriſtopher's*, nor could ſhe ſail to any other place to be repaired; and that if this misfortune had happened in *North America*, or *England*, where there are proper docks and materials, ſhe might have been repaired for three or four hundred pounds: that while the ſaid ſhip was firſt at *St. Chriſtopher's*, before ſhe had taken in her cargo, namely, on the 23d of *April* 1764, the captain wrote the following letter to the plaintiffs:

" Gentlemen, *St. Chriſtopher's, April* 23, 1764.

" I take the firſt opportunity of acquainting you, that I ar-
" rived at *Nevis*, after a moſt diſmal paſſage, on the firſt inſtant.
" On the ſixth of *March*, at day-break, I made the iſlands
" *Deſerts*, diſtant about four leagues, ran down for *Madeira*,
" with a freſh gale at E. S. E. till four in the afternoon, when
" being within a mile off the ſhore, and judging about five or
" ſix miles off *Fenchall Road*, *a very hard and dark ſquall*
" *took us ſuddenly with ſuch violence, that I was obliged to clear off* [227]
" *the land under the courſes*. It was exceſſively hazy the whole
" evening after, that one could hardly ſee the ſhip's length;
" ſo that it would have been the greateſt imprudence to have
" run the riſk of overſhooting our port, or running aſhore.
" The gale increaſed, and, in the night, came round to the
" N. E. and *the ſhip ſtrained ſo much by the preſſure of ſail we*
" *were obliged to carry on her in that great ſea, that it was with*
" *the utmoſt difficulty we could keep her free*. On the eighth, at
" nine in the morning, reckoning myſelf nineteen leagues to
" leeward of *Madeira*, *our ſhip ſo looſened*, that we could not
" carry ſail upon a wind; and ſeeing no probability of the
" wind ſhifting or abating enough to give us a chance of beat-
" ing up, bore away for *Nevis*, judging it better for the pre-
" ſervation of the whole than to run any hazard in endeavour-
" ing for the *Canaries* in our weak, leaky, and diſtreſſed con-
" dition. I have conſulted with Mr. *Cottle*, the counſellor here,
" who adviſes me to ſell the flour and lime at publick vendue,

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" and to carry the iron hoops, *&c.* back to *England. As the* " *ship's complaint has been chiefly in her upper works, I am obli-* " *ged to have her new nailed from the wail upwards*; and hope " you will find that what repairs are neceſſary to be made here, " are conducted with all the frugality circumſtances will ad- " mit of."

That the plaintiffs received this letter in *London* on the 13th day of *June* 1764, and, a day or two afterwards, gave it to *Matthew Towgood*, an inſurance broker, to get 1,000 *l.* inſured on the freight home for the uſe of the owners, and 250 *l.* on their fourth part of the ſaid ſhip: that the ſaid *Towgood* firſt ſhewed the policy in queſtion, and the letter to the ſaid *George Hayley*, on the 19th of *June* 1764, who, after reading over the letter, aſked him what intereſt he had to inſure; to which the broker anſwered, ſhip, freight, and cargo; and that he might write which he pleaſed: that thereupon the ſaid *George Hayley* ſaid he would underwrite the ſhip, ſaying ſhe would come home ſafe enough, notwithſtanding the damage which the ſaid letter imported ſhe had received, as it was a ſummer voyage; but that ſhe would very likely damage her cargo: that the ſaid *George Hayley* was going to underwrite the ſaid policy for 300 *l.* on the ſaid ſhip, and had wrote the figure 3; but on the ſaid *Matthew* [228] *Towgood*'s telling him, he was a bold man to write three hundred pounds after reading the ſaid letter, the ſaid *George Hayley* ſtruck out the figure 3, and converted it into a 2, and accordingly underwrote the ſaid policy for the ſum of two hundred pounds on the ſaid ſhip: that the ſaid *Matthew Towgood* ſhewed the ſaid letter to the ſaid defendant *Roebuck*, and all the other underwriters on the ſaid policy, before they underwrote the ſame; and the ſaid defendant ſays, that the evidence aforeſaid, in manner and form aforeſaid, ſhewn by the plaintiffs to the jury, is not ſufficient in law to maintain the iſſue within joined on the part of the ſaid plaintiffs; and that he the defendant to the evidence aforeſaid hath no neceſſity, nor by the law of the land is obliged to anſwer. Wherefore he prays judgment, and that the jury may be diſcharged from giving any verdict upon the iſſue.

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The plaintiffs join in demurrer.

This demurrer was argued in the court of Exchequer, and judgment was there given in favour of the aſſured: and of what fell from the judges on that occaſion, I have only been able to procure this account, "that judgment was given for "the plaintiffs, not upon the points argued, (namely, that it "was eſſential that the ſhip ſhould be ſea-worthy), the court "being as to thoſe of opinion with the underwriters; but "becauſe the evidence did not, as the court thought, pre-"ciſely prove that the ſhip was not ſea-worthy, at the time "of the aſſurance taking place on the 1ſt of *April* 1764, on "her arrival at *Nevis*, but only that ſhe was ſo at the time "of her ſailing on the 26th of *July*." But the court unequivocally declared, that a ſhip, that is not *at the commencement of the inſurance* in fit condition to perform her voyage, is not a fit ſubject of inſurance. Upon this judgment a writ of error was brought in the Exchequer Chamber, which was argued before Lord *Mansfield* and Lord Chief Juſtice *Wilmot*, who were to report their opinions thereon to the Lord Chancellor; and the judgment of the court below was ultimately affirmed. Whether the judgment was ſo affirmed upon the ſpecifick ground taken in the court of Exchequer, or upon ſome difficulty ariſing out of the form of proceeding (being upon a demurrer to evidence (*a*),) does not now appear: but whether upon the one ground, or the other, there is no doubt,

(*a*) See the caſe of *Cockſedge* v. *Fanſhaw*, *Dougl.* 119. and the caſe of *Gibſon* and *Johnſon* v. *Hunter*, in error, in the Houſe of Lords, 2 *H. Black.* 187. where it appears to be decided by all the judges, that in a caſe of circumſtantial evidence (as in the caſe of the *Mills Frigate*) it *is not* competent to the defendant to inſiſt upon a jury being diſcharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, without diſtinctly admitting upon the record, every fact and *every concluſion*, which the evidence given for the plaintiff tended to prove. And in the former caſe it is expreſsly ſaid, that the demurrer to evidence *admits* the truth of all facts, which the jury *might* or *could* infer in favour of the party offering the evidence. Upon the form of proceeding therefore in the caſe of the *Mills Frigate*, and conſiſtently with the notion entertained at the time when *Cockſedge* v. *Fanſhaw* was decided of the effect of a demurrer to evidence, as it was a caſe of circumſtantial evidence, on which the jury *might* have drawn a concluſion in favour of the plaintiffs, it is poſſible that judgment might have been given for the plaintiffs independently of the ground taken in the court of Exchequer, and whatever opinion the judges might entertain on the main point in the cauſe.

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though judgment was given for the plaintiffs, that the principles of insurance law upon the subject of sea-worthiness, and the doctrine of implied warranties or conditions, have always been considered as unalterably fixed and ascertained since that period, although that doctrine was not then for the first time stated in our *English* courts, and was certainly long before known in the law of insurance in other parts of *Europe*. It is unfortunate that from the circumstance of there being no printed report of this case, and from the practice of the Chief Justice's reporting their opinion in private, the grounds of that opinion cannot now be obtained: but it cannot now be disputed from the opinions of Lord *Mansfield* and other judges both before that time and since, that the principles laid down in the beginning of this chapter are clearly established as the law of *England*.—That these principles were so established is manifest from the following decisions.

Lee v. Beach, Sittings at Guildhall after Michaelmas Term 1762.

The plaintiff had purchased a ship, and after having her surveyed by proper judges, he sent her into the dock, and there had her fully repaired, and the ship-builder was ready to swear, that he effectually repaired her, as he thought, having done all that was required to make her a good ship; she then was taken into the government service, on which occasion she was as usual surveyed by the persons employed for the purpose. She sailed out of the *Thames*, and arrived at *Portsmouth*, but being very leaky with bad weather the Admiral ordered her to go in and undergo a survey there. This was done, and it was found on opening her, that some timbers near her keel were very bad, insomuch that she was condemned as insufficient to proceed.

The plaintiffs having insured her, applied to the underwriters for the loss; defendant was one; and plaintiff insisted he had and could prove that he had done every thing in his power to send her out sufficient and good, and that this defect was a latent cause not known to him or discovered when she was surveyed or in the dock repairing.

Lord *Mansfield* said, that it appeared that the ship had died a natural death, and received her death blow before the insu-

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rance commenced; and however innocent the plaintiff was, and however cautiously he had acted, the underwriter was equally innocent; and the implied warranty muſt and ought to have its effect; and the plaintiff muſt make the beſt of a bad bargain: he had the ſhip (defective as ſhe was) not injured from any ſea loſs after the inſurance was made. The plaintiff was nonſuited. CHAP. XI.

So alſo in another caſe where an action was brought by an innocent ſhipper of goods (no part owner of the ſhip) againſt the underwriter, and the policy was effected on goods in the *Amy and Lætitia at and from Montſerat to London.* It appeared that the ſhip ſailed the 26th of *July*, and the next day without any bad weather ſhe was very leaky and obliged to run for *St. Thomas's*, one of the *Virgin* iſlands, where ſhe was unloaded, and the goods, being much damaged, were ſold. It could not but be allowed on all ſides, that the ſhip was not ſea-worthy to undertake the inſured voyage; and it was agreed and admitted by defendant that the ſhipper of the goods was a ſtranger to it when the goods were ſhipped. The plaintiff was nonſuited, Lord *Mansfield* ſaying, that the implied warranty could not be diſpenſed with in any caſe; that it was a point of law, and if the plaintiff's counſel thought there was any ground to go upon he would ſave the point; but the plaintiff's counſel declined this, being ſatisfied the queſtion was clear againſt them. The plaintiff was nonſuited. Oliver v. Cowley, Sittings at Guildhall after Trin. 1765.

That theſe principles, ſubſequent to the caſe of the *Mills Frigate*, were deemed to be unſhaken is manifeſt from this, that within two years after the caſe of the *Mills Frigate* was decided (judgment having been given in that cauſe in *January* 1769) Lord *Mansfield*, in the caſe of the *Earl of March* v. *Pigot*, which came before the court of King's Bench in the year 1771, the caſe of the *Mills Frigate* having been mentioned at the bar, ſaid "The inſured ought to know whether his ſhip was ſea-worthy or not when ſhe ſet out upon the voyage inſured: but how ſhould he know the condition ſhe might be in, after ſhe had been out a twelvemonth(a)?" [229] 5 Burr. 2802.

(a) In ſome of the *dicta* upon this ſubject, the learned judges muſt be taken to be ſpeaking of caſes where the riſk begins *from the ſailing*.

And

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And again his Lordſhip, in the caſe of *Eden* v. *Parkinſon*, decided in the year 1781, confirmed the doctrine, by obſerving that "by an implied warranty, every ſhip inſured muſt be "tight, ſtaunch, and ſtrong: but it is ſufficient if ſhe be ſo at "the time of her ſailing. She may ceaſe to be ſo in twenty-"four hours after her departure, and yet the underwriter will "continue liable."

Dougl. 732.

So alſo in a very modern caſe, the law reſpecting the implied warranty of ſea-worthineſs was accurately ſtated, and the reaſon of it clearly illuſtrated by Mr. Juſtice *Lawrence*. The learned judge ſaid, "I alſo doubt whether there is any analogy "between a caſe like the preſent and caſes where there is an "implied warranty of ſea-worthineſs. The latter is implied "from the nature of a contract of inſurance. The conſide-"ration of an inſurance is paid in order that the owner of a "ſhip, *which is capable* of performing her voyage, may be in-"demnified againſt certain contingencies; and it ſuppoſes the "poſſibility of the underwriter gaining the premium: *but if* "*the ſhip be incapable* of performing her voyage, there is no "poſſibility of the underwriters gaining the premium; and if "the conſideration fail, the obligation fails. In the caſe of "the *Mills Frigate* it was ſaid that the ſhip's being capable of "performing the voyage was the *ſubſtratum* of the contract "of inſurance. So if a ſhip ſail without a ſufficient crew, ſhe "is incapable of performing the voyage."

Chriſtie v. Secretan, 8 Term R. 192.

The doctrine thus eſtabliſhed is by no means novel in itſelf, but is entirely conſonant to the laws of all the maritime and commercial nations in *Europe*, as will preſently be demonſtrated.

[229*a*] The ſea-worthineſs of the ſhip being thus ſhewn to be an implied condition in this ſpecies of contract, it follows of courſe, that, in entering into the engagement, it is not neceſſary that there ſhould be any previous repreſentation of the condition of the ſhip; becauſe, unleſs it be fit for the performance of the voyage inſured, there is no binding contract; and any inſufficiency of the veſſel in a former voyage will not vacate the policy.

Thus

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Thus in an action upon a valued policy of insurance upon the ship *Two Sisters*, and a cargo of wheat and wines, *from Madeira to Charlestown*. The ship had sailed *from London to Madeira*. The plaintiff, who was owner of the cargo, ordered his broker to procure an insurance *from Madeira* for the voyage to *Charlestown*, which was accordingly done; but he did not communicate to his broker or the underwriters two letters which he had received from his captain the day before he effected the insurance, stating, that the ship had arrived at *Madeira*, but was very leaky, and that the pipes of wine had been half covered with water. But it was proved at the trial, that the leak had been completely stopped before she sailed from *Madeira*, and of course before the commencement of the risk insured. In her voyage to *Charlestown* she was taken, and the plaintiff abandoned.

Shoolbred v. Nutt, Sittings at Guildhall after Hill. 1783.

Lord *Mansfield* told the jury, "that there should be a representation of every thing relating to the risk, which the underwriter has to run, except it be covered by a warranty. *It is a condition, or implied warranty, in every policy, that the ship is sea-worthy*; and therefore there need be no representation of that. *If she sail without being so, there is no valid policy.* Here the leak was stopped before she sailed from *Madeira*, and she sailed in good condition from thence; and there is no occasion to state the condition of a ship or cargo at the end of her former voyage." There was a verdict for the plaintiff.

[229*b*]

Upon this principle also depends the decision of some modern cases; for if it be necessary that the ship itself should be sufficient for the voyage, it seems also to be an implied condition, that she should be furnished with every thing necessary for the purposes of safe and careful navigation. In an action upon a policy on ship and goods from *Stettin to London*, it appeared that the captain had taken *a pilot* on board at *Orfordness* on entering the river *Thames*, who again quitted her at *Halfway Reach*; after which, and before she had come to her moorings higher up the river, the accident happened which occasioned the loss, and in consequence of which the vessel

Law v. Hollingworth, 7 Term R. 160.

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veſſel filled with water before ſhe had been moored twenty-four hours. But the preciſe time, at which the damage was ſuſtained within thoſe limits, or by what particular default, was not aſcertained. The captain had alſo left the ſhip before the time of the actual loſs. It further appeared that the pilot taken in at *Orfordneſs* was not properly qualified at the time according to the proviſions of the 5 *Geo.* 2. *c.* 20. for the regulation of pilots on the river *Thames*, but it did not appear that this fact was known to the captain, and the pilot had ſince received his regular qualifications. The plaintiff having obtained a verdict, a motion was made to ſet it aſide; and after argument,

Lord *Kenyon* ſaid,—"The principle on which this caſe muſt be determined ſeems to be admitted on all hands, namely, *that the aſſured cannot recover on a policy of aſſurance, unleſs they equip the ſhip with every thing neceſſary to her navigation during the voyage; the ſhip herſelf muſt be ſea-worthy, ſhe muſt have a ſufficient crew, and a captain and pilot of competent ſkill.* I do not feel that I am bound in this caſe to decide whether or not it be neceſſary that there ſhould be on board the veſſel a pilot qualified according to the act of parliament referred to. This caſe may be diſpoſed of without deciding that queſtion. It might be contended, though with what effect I will not ſay, that if the captain had taken a pilot, who repreſented himſelf duly qualified, and whom the captain believed to be ſo, but who in fact had not a qualification, the captain would have diſcharged his duty, and the underwriters would have been anſwerable for any loſs that had happened. But in this caſe, the captain did not perform his duty; for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind that there ſhall be ſome perſon on board the ſhip apparently qualified to navigate her. If the underwriters had been previouſly informed that there would be no pilot on board during the ſhip's ſailing up the river *Thames*, probably they would not have undertaken the riſk. On the ground, therefore, that there was *no pilot* on board when the accident happened, I am of opinion that there muſt be judgment of nonſuit."

Mr. Juſtice

Mr. Juſtice *Groſe*.—"The queſtion is not, whether the aſſured can recover in a caſe where there was a pilot on board, though not properly qualified; but, whether or not the defendant be liable for a loſs, which happened to the veſſel when there was no pilot of any kind on board? I think he is not, becauſe *it is underſtood in all contracts of inſurance that there ſhall be ſuch a perſon on board the ſhip.*"

Mr. Juſtice *Lawrence* concurring, the rule for entering a nonſuit was made abſolute.

In the ſubſequent term, the ſame principle of an implied warranty that every ſhip inſured ſhall be duly navigated was the rule of deciſion in another caſe, and was taken to be ſo well eſtabliſhed both at the bar and on the bench, that that point was never mooted; and the only queſtion made upon the occaſion was, Whether the condition had not been performed? It was an action on a policy of inſurance on the *Cadiz Diſpatch*, on a voyage from *London* to the coaſt of *Africa*; and the principal queſtion was, whether the ſhip had been navigated in the manner preſcribed by the ſtatute of 31 *Geo.* 3. *c.* 54. *ſ.* 7. (*a*) for if not, it was agreed that the inſurance was void. The ſtatute requires that no perſon ſhall take the command of an *African* ſhip until he ſhall have made oath, and produced to the officer of the cuſtoms *a certificate atteſted by the reſpective owner or owners* that he has already ſerved in that capacity during one voyage, or as chief mate and ſurgeon during two voyages, &c. under certain penalties. The court were of opinion, that the certificate produced in the particular caſe, being ſigned by the then owner, did not comply with the requiſitions of the ſtatute, that therefore the ſhip was not duly navigated, and confirmed the judgment of nonſuit, which had paſſed againſt the plaintiff at *Guildhall*, by Lord *Kenyon*'s directions.

Farmer v. Legg, 7 Term R. 186.

(*a*) This was one of the ſtatutes paſſed on the ſubject for regulating the *African* ſlave trade; it has ſince been continued down by ſeveral acts from time to time; and the reference is made to this particular act, as being ſet out in Mr. ſerjeant *Runnington*'s edition of the Statutes: but the act quoted in court was 32 *Geo.* 3. c. 52.

I have

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I have alluded to the above decision, as ſtrongly confirming the principles of law, which are the ſubject of the preſent chapter. I think it proper to mention that the difficulty which occurred in the laſt caſe from the manner in which the acts of parliament were penned, has been removed by the ſtatute 39 *Geo.* 3. *c.* 80. *ſ.* 23. requiring expreſsly that the certificate ſhall be ſigned by the owner or owners of the ſhips or veſſels in which the captain has *formerly ſerved*. But as it had been as much the cuſtom in the outports to receive certificates of one form as of the other, on account of the doubtful penning of the former acts, the legiſlature in the laſt mentioned ſtatute (ſ. 38.) has provided that no policies of inſurance made before the ſtatute now in recital ſhall be held to be void, on account of the irregular certificates given under the former ſtatutes.

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In the ordinances of *Lewis* the fourteenth it is declared, that decay, waſte, or loſs, which happens from the internal defect of the thing inſured, ſhall not fall upon the underwriter. A commentator upon theſe ordinances has gone into the reaſon and principle of ſuch a regulation, and has ſhewn the propriety of it. He ſets out by obſerving, that this doctrine is of a date as ancient as the period when the *French* treatiſe called *Le Guidon* was publiſhed, which was about the year 1661, at which time, as appears by a reference to the book itſelf, it was conſidered as a ſettled principle, that loſſes, happening from cauſes of this nature, were not to be a charge upon the underwriter. The ſame author has alſo ſhewn, that ſuch a proviſion is adopted in favour of the inſurers by the ordinances of *Rotterdam* and *Amſterdam*. After ſtating theſe circumſtances, he proceeds to ſay, that when a ſhip is deemed incapable of finiſhing her voyage, the queſtion whether this event is a charge upon the underwriters or not, depends upon another; namely whether it happened by the violence of the ſea, or other fortuitous circumſtance, or whether the diſability proceeds from age and rottenneſs. This will be determined by the enquiry which was made before the departure of the ſhip, in order to judge, whether it was in a condition to perform the voyage or not: if the latter was the caſe, the inſurers ought not to anſwer. In another part

Ord. of Lewis 14th, tit. Inſur. art. 12. 2 Val. 80.

C. 5. art. 8.

2 Mag. 90. 140. 8 Val. 81.

1 Val. 654.

part of this work, after laying down the ſame doctrine, he declares, that the indemnity will be void, even though the ſhip has been examined before her departure, and declared capable of performing the voyage; ſince the event has ſhewn clearly, that on account of latent defects it was no longer navigable; that is, if it were proved that parts of the ſhip were ſo rotten, weakened, and deſtroyed, that ſhe was not in a proper ſtate to reſiſt the ordinary attacks of wind and ſea, inevitable in every voyage, then the underwriters are diſcharged. The reaſon is, that the examination of the ſhip before her departure extends only to the external parts, becauſe ſhe is not unripped; at leaſt not ſo as to diſcover the interior and latent defects, for which the owner or maſter of the ſhip continues always reſponſible, and that with the greater juſtice, becauſe they cannot be wholly ignorant of the bad ſtate of the ſhip: but ſuppoſing them to be ſo, it is the ſame thing, being indiſpenſably bound to provide a good ſhip, able to perform the voyage (*a*).

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The opinion of this learned foreigner is ſupported by two of his countrymen, *Pothier* and *Emerigon*.

Pothiér Tr. d'Aſſurance. n. 66. 1 Emerigon, p. 580.

Having thus ſhewn that the doctrine of ſea-worthineſs, as eſtabliſhed by the deciſions of our courts of juſtice, is confirmed by the declarations of foreign laws, and by the opinions of foreign writers; it is ſufficient now to ſay, that where the ſhip is not ſea-worthy, the policy of inſurance is void, as well where the inſurance is upon the goods to be conveyed in the ſhip, as when it is upon the ſhip itſelf. For whenever a caſe ariſes with reſpect to damage done to goods through the inſufficiency of the ſhip, the queſtion, whether the maſter or owner is liable to make good the loſs, depends upon aſcertaining, whether the ſhip was in a condition to perform the voyage at the time of the commencement of the riſk, or became defective from bad weather, and the perils of the wind and ſea.

2 Val. 164.

(*a*) Upon the doctrine of implied conditions ſee *Rocus*, note 98.

CHAPTER THE TWELFTH.

Of Illegal Voyages.

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WE proceed now to the conſideration of another circumſtance by which the contract of inſurance is vacated and annulled *ab initio*: and it is this; that whenever an inſurance is made on a voyage expreſsly prohibited by the common, ſtatute, or maritime law of the country, the policy is of no effect. The principle, upon which ſuch a regulation is founded, is not peculiar to this kind of contract; for it is nothing more than that which deſtroys all contracts whatſoever: that men can never be preſumed to make an agreement forbidden by the laws; and if they ſhould attempt ſuch a thing, it is invalid, and will not receive the aſſiſtance of a court of juſtice to carry it into execution.

The moſt material caſe upon this point is that of *Johnſon* and *Sutton*, which came on to be argued in the year 1779, and received the ſolemn opinion of the court of King's Bench.

Johnſon v. Sutton, Doug. 254.

It was an action on a policy of inſurance on goods, on board the ſhip *Venus*, "loſt or not loſt, at and from *London* to *New York*, warranted to depart with convoy from the Channel for the voyage." The cauſe was tried before Lord *Mansfield* at *Guildhall*, and a verdict was found for the plaintiff. The defendant obtained a rule to ſhew cauſe why there ſhould not be a new trial. The facts, upon his Lordſhip's report, appeared to be theſe: the ſhip was cleared for *Halifax* and *New York*. She had proviſions on board, which ſhe had a licence to carry to *New York*, under a proviſo in the prohibitory act of 16 *Geo.* 3. *c.* 5. But *one half of the cargo, including the goods, which were the ſubject of this inſurance, was not licenſed*, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe* to allow the entry of unlicenſed goods at *New York*; and though there were bonds uſually

uſually given at the Cuſtom Houſe here, by which the captain engaged to carry the goods to *Halifax*, thoſe bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpoſe at *New York*, declaring, that they were landed there. *The commander in chief had no authority under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods.* The *Venus* was taken in her paſſage to *New York* by an *American* privateer. The firſt ſection of the ſtatute prohibits all commerce with the province of *New York* (amongſt others) and confiſcates all ſhips and their cargoes, which ſhall be found trading, or going to, or coming from trading with them. In ſection the ſecond, there is a proviſo, excepting ſhips laden with proviſions for the uſe of his majeſty's garriſons or fleets, or for the inhabitants of any town poſſeſſed by his majeſty's troops, provided the maſter ſhall produce a licence ſpecifying the voyage, *&c.* and the quantity and ſpecies of proviſions; but by the ſame *proviſo*, it is declared, that goods not licenſed, found on board ſuch ſhip, ſhall be forfeited. After argument, upon the motion for a new trial, 16 Geo. III. c. 5.

Lord *Mansfield* ſaid—"The whole of the plaintiff's caſe goes on an eſtabliſhed practice, directly againſt an act of parliament. If the defendant did not know that the goods were unlicenſed, the objection is fair as between the parties. If he did, he would not deſerve to be favoured. But, however that may be, it was illegal to ſend the goods to *New York*, and, *in pari delicto, potior eſt conditio defendentis.* It is impoſſible to bring this within the caſes cited (*a*), becauſe here there was a direct contravention of the law of the land." The rule for a new trial was made abſolute.

Upon this principle it was that in the cauſe of *Camden* and others v. *Anderſon*, which was long conteſted in the court of King's Bench, and afterwards upon writ of error in the Exchequer Chamber, the underwriters were held not liable, the inſurance in that caſe being made in direct contravention of the excluſive right of trading granted to the *Eaſt India* Com- Camden v. Anderſon, 6 Term R. 723. 1 Boſ. and Pull. R. 273.

(*a*) Theſe were caſes of inſurances on ſhips trading contrary to the revenue laws of foreign countries, of which more will be ſaid hereafter.

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pany by ſtat. 9 & 10 *Wil.* 3. c. 44. ſ. 81. and which excluſive right had never for one moment been ſuſpended, nor had that ſtatute ever ceaſed to be an exiſting law. Indeed the principle, which deſtroys all inſurances made on ſhips proceeding on illegal voyages, never was conteſted at the bar in the argument of the above cauſe; but only the application of it to the particular caſe, on account of various ſtatutes which had been paſſed and repealed, and on account of a clauſe in a more modern ſtatute, which it was ſuppoſed precluded the underwriters from ſetting up this defence. But no man attempted to argue that that which is unlawful, and a publick wrong, could be the ground of an action.

33 Geo. III. c. 52. ſ. 150.

Wilſon v. Marryat, 8 Term R. 31. and 1 Boſ. and Pull. 430. in which books the judgments in the King's Bench and Exchequer Chamber are fully and accurately given.

Soon after the above deciſion, a caſe aroſe in which the rights of the *Eaſt India* Company, as far as they were affected by the treaty between this country and *America*, came to be diſcuſſed in an action on a policy of aſſurance. By the 13th article of that treaty, which was confirmed by ſtat. 37 *Geo.* 3. c. 97. ſ. 22. the United States of *America* are permitted to trade to and from the *Britiſh* territories in *India*. But it was contended, notwithſtanding the treaty and ſtatute, that the inſurance in queſtion was upon an illegal voyage, being "at "and from *Bourdeaux* to *Madeira* and the *Eaſt Indies*, and "back to *America*," whereas the treaty meant to tolerate no other trading than *a direct one* between *America* and the *Eaſt Indies*; and alſo it was inſiſted, that *Butler* and *Collet*, the perſons for whoſe benefit this inſurance was effected, were not entitled to the benefit of the treaty, they being natural-born ſubjects of this country, but one of whom, after the ratification of *American* independance, had gone with his wife and family to reſide in *America*, has ever ſince been domiciled there and received as a citizen of the ſtates of *America*; and the other of whom was reſident and domiciled in *America* before the independance of that country, and has continued to be reſident and domiciled there; and becauſe their agent, the plaintiff, when he ſhipped the goods, and when he cauſed the policies to be effected, was reſident in, and a ſubject of *Great Britain*, and knew that the ſhip was deſtined for the *Britiſh* territories in *India*. The ſpecial verdict in this caſe was three times

argued in the King's Bench, and once in the Exchequer Chamber; and the learned judges, compoſing both thoſe courts, were unanimouſly of opinion, that a natural-born ſubject of this country, though he cannot throw off his allegiance to the country, yet he may be a citizen of *America* for the purpoſes of commerce, and entitled in the latter character to all the benefits of the treaty; and that the trade allowed by the treaty between *America* and the *Eaſt Indies* need not be *direct*; it may be carried on circuitouſly through any country in *Europe*, including *Great Britain*. The plaintiffs had judgment. In the court of King's Bench, Lord *Kenyon* added, that if in the commencement of one *entire* voyage, there be any thing illegal, and an inſurance be effected on the latter part of the voyage, which taken by itſelf would be legal, ſuch illegal commencement would have made the whole illegal, and the aſſured could not recover upon the policy.

From theſe caſes much information is to be collected; for, 1ſt, the principle advanced at the beginning of the chapter is eſtabliſhed, that is, that an inſurance of a voyage, which is prohibited by ſtatute, is void. They alſo ſerve to remove a diſtinction, which occurs in a very reſpectable writer. The learned *Roccus* obſerves, that if ſuch an inſurance, as that of which we have been ſpeaking, ſhould be made, *ignorante aſſecuratore*, the inſurer is diſcharged: from whence we are to infer, that in his opinion, if the inſurer was acquainted with the nature of the voyage, he would continue liable. But the doctrine of the courts overturns ſuch a diſtinction, becauſe the very contract is a nullity, and a court of juſtice can never lend its authority to ſubſtantiate a claim, founded upon a contract which is abſolutely repugnant to the known and eſtabliſhed laws of the land. Of this opinion is *Bynkerſhoek*, who ſays, that even if it be told to the underwriter, that the voyage is illicit, he ſhall not be bound; becauſe the contract is null and void, and where that is the caſe, the compliance with the terms of it depends upon the will of the contracting parties merely. But that which depends merely upon will is not a proper ſubject for a ſuit at law.

Roccus de Aſſecurat. n. 121.

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Bynk. Quæſt. Jur. Pub. l. 1. c. 21, ſub fine.

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If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, laid on in time of war, by the prince of the country, in whoſe ports the ſhip happens to be, ſuch an inſurance alſo is void. This depends upon the power of an embargo, the right of laying on which by the ſovereign of this country in time of war is undoubted; although in time of peace it may be a different queſtion. The right being admitted, it follows of courſe, that any act done in contravention of a proclamation of this nature, is illegal and criminal; becauſe it is equally binding as an act of parliament, and a contract founded on ſuch illicit proceedings is conſequently void.

1 Black. Com. 270.
Vide ante, 79.

Delmada v. Motteux, B. R. Michaelmas 25 Geo. III.

This was determined in a very modern caſe, upon a ſpecial verdict. It was an action on a policy of inſurance on the *Bella Juditta*, a *Venetian* ſhip, *at and from London to the Grenades, with liberty to touch at Cork and Madeira to load.* The defendant pleaded the general iſſue; and the cauſe came on to trial before Mr. Juſtice *Buller*, when the jury found a ſpecial verdict, the material facts in which were theſe: That the ſhip was a *Venetian* veſſel, and the plaintiff a ſubject of the ſtate of *Venice*; that in *October* 1782, the ſhip ſailed on her voyage from *London* to *Cork*, and there took in a loading of proviſions, the property of *French* ſubjects, the enemies of the king of *Great Britain*. That the ſaid ſhip, having taken in at *Cork* clearances and bills of lading for *Madeira*, an iſland belonging to the king of *Portugal*, ſailed in *December* 1782, from *Cork* to that iſland, at which ſhe was neither to unload any part of her cargo, nor to receive any goods on board, but where ſhe took clearances and bills of lading for the iſland of *St. Thomas*, belonging to *Denmark*, whither ſhe was not deſtined: that on her voyage from *Madeira* to *Grenada*, within 14 leagues of the latter, ſhe was captured by an *Engliſh* man of war as prize, and carried to *St. Lucia*: that when the ſhip ſailed from *London*, and from thence till after the capture, *Grenada* was in the poſſeſſion of the *French* king. The ſpecial verdict further finds, that his majeſty on the 18th day of *Auguſt* 1780, laid an embargo upon all ſhips and veſſels laden or to be laden in the ports of the kingdom of *Ireland* with black cattle and hogs, beef,

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beef, pork, butter, and cheeſe, or any ſort of proviſions. It is alſo found, that after the capture, a ſuit was commenced in the Vice Admiralty Court at *Barbadoes*, againſt the ſaid ſhip and cargo, as belonging to the *French* king, or to ſome of his ſubjects; and the judge of that court did condemn the cargo as the property of the enemies of the king of *Great Britain*, which ſentence was appealed from, and is now depending: that the judge of the ſaid Court of Vice Admiralty was of opinion, that the ſaid ſhip *Bella Juditta* was the property of *Abram Delmada* the plaintiff, and ordered that the ſhip ſhould be reſtored; but he did not conceive the owner of the ſaid ſhip to be entitled to any freight, or damages occaſioned by the capture, becauſe ſhe was engaged in a wrong act, and the captor did no more than his duty; that the ſaid ſhip was accordingly reſtored.

Upon this verdict, the queſtion for the court to decide in point of law, was, whether the inſurers upon the ſhip on this voyage were liable to pay for this loſs of freight, and the damages occaſioned by the capture?

Lord *Mansfield*.—"Is this voyage not a breach of the embargo? The king in time of war has an undoubted right to lay an embargo: in time of peace it is another queſtion. Every power lays them on. If the ſhip had only been carrying goods of an enemy on a voyage lawful for her to perform, ſhe might have been entitled to freight. But here the ſentence ſays, ſhe ſhall not. And why? becauſe ſhe has done a wrong thing. It is a fraud; for under colour of a neutral port, ſhe goes to an enemy's port. She breaks an embargo. What the conſequence of that is, has not as yet been ſettled: but to break an embargo is undoubtedly a criminal act; and wherever a man makes an illegal contract, this court will not lend him their aid." The defendant accordingly had judgment. [236]

Though an inſurance upon a ſmuggling voyage, prohibited by the revenue laws of this country, would be void under the principle above ſtated: yet the rule has never been ſuppoſed to extend to thoſe caſes, where ſhips have traded, or intend to

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trade, contrary to the revenue laws of foreign countries, becauſe no country takes notice of the revenue laws of another: in ſuch caſes, therefore, the policy is good and valid; and if a loſs happen, the underwriter will be anſwerable.

Vide ante, c. 10. p. 193.

Thus in the caſe of *Planche* againſt *Fletcher*, which was ſtated at large in a preceding chapter, one of the objections taken to the inſurance was, that there was a fraud on the underwriters, the ſhip having been cleared out for *Oſtend*, although ſhe was never deſigned to go to that place. But Lord *Mansfield* declared for himſelf and his brethren, that it was no fraud on the underwriters, perhaps on nobody. The reaſon for clearing for *Oſtend*, and ſigning bills of lading, as from thence, did not fully appear: but it was gueſſed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the ſame on ours, and it may be the intereſt of the farmers to connive at the importation of *Engliſh* commodities, and take *Oſtend* duties rather than ſtop the trade, by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another.

In another caſe, a ſhort time afterwards at *Guildhall*, Lord *Mansfield*, in his charge to the jury, advanced the ſame doctrine which had been eſtabliſhed by the whole court in the preceding caſe.

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Lever v. Fletcher, Lond. Sitt. Hil. Vac. 1780.

It was an action on a policy of inſurance, at and from *London* to *Penſacola* and *Manſhae* in the river *Miſſiſſippi*, with liberty to touch at *Portſmouth* and *Jamaica*. The ſhip inſured, was employed in the uſual trade in the river *Miſſiſſippi*, and traded at *Little Manſhae*, on the iſland of *New Orleans*, part of the dominion of *Spain*. *Manſhae*, the place mentioned in the policy, is part of the continent of *North America*, on that ſide of the river, which *France* and *Spain*, by the treaty of *Paris* in 1763, ſurrendered to *Great Britain*, and is about 37 leagues higher up the river than *New Orleans*. The loſs happened by a ſeizure of the ſhip at *Little Manſhae* by the *Spaniſh*

Spaniſh governor, as a repriſal for tranſgreſſions alledged to have been committed by a king's ſhip in the *Lakes*. The counſel for the defendant contended, that the policy in queſtion was on a trading voyage, and that the trade itſelf was an illicit one.

Lord *Mansfield*.—" The firſt queſtion is, whether this policy covers the trading on the *Miſſiſſippi* before the ſhip's arrival at *Manſhac*. The trading at *Little Manſhac* is a delay of the voyage, and an increaſe of the riſk. If the policy do not cover this part of the trading, then it is a deviation, and there is an end of the contract, at leaſt, ſo as to prevent the plaintiff from recovering. It is very clear what the trade is. Every trading with the ſubjects of *Spain* is illicit by the treaty of *Paris*. The navigation is free to both countries; and the municipal laws of both countries remain. *Though ſuch trading be contrary to the laws of* Spain; *yet no country pays attention to the revenue laws of another. Therefore, if the defendant had, with full knowledge that it was a ſmuggling trade with* Spain, *made the inſurance, then it might be a fair contract between the parties.* But the main queſtion for conſideration ſeems to be, whether this trading at *Little Manſhac* was inſured by the policy." The jury found for the defendant; and it may be preſumed on the ground of deviation.

It cannot be improper, becauſe it is nearly connected with the ſubject before us, to enter upon the enquiry, how far trading with an enemy, in time of actual war, is legal? The opinion of foreign writers upon this point, cannot fail to afford information upon the queſtion. It has long been ſettled in *France*, that all trading with enemies is illegal. This indeed is given as the reaſon for requiring to be inſerted in the policy of inſurance, the name and place of abode of the inſured, the effects upon which the inſurance is made, the name of the ſhip, and the place of loading and unloading. By complying with ſuch a requiſition, it is known in time of war, whether, notwithſtanding the prohibition of commerce, which, according to theſe writers, a declaration of war always imports, the ſubjects of the king continue to trade with the enemies of the

Guid. c. 2. art. 2, 3, and 5. 2 Val. 31.

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Bynk. Q. Jur. Pub. lib. 1. c. 3.

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ſtate, or with their friends and allies; by which means they would be able to convey warlike ſtores, proviſions, and other prohibited goods to the enemy. But every thing of this kind being forbidden, as prejudicial to the ſtate, would be liable to confiſcation, and to be condemned as prize, whether found in ſhips of our country, or of friends and allies. The prohibition to inſure the property of an enemy, which is almoſt generally eſtabliſhed by the ordinances of foreign countries, proceeds upon the principle, that it is unlawful to trade with an enemy; becauſe if commerce were allowed to be carried on between the hoſtile nations, there could not poſſibly be an objection to protect that commerce by means of the contract of inſurance.

Ord. of Stockholm, &c. 2 Mag. 277.

The general law of *England* had not, till lately, laid down any expreſs rule upon the ſubject; but we muſt take notice of what has paſſed in the courts of juſtice upon the queſtion. The only ancient caſes to be found in the books upon the ſubject are two; the one is in *Roll*'s Abridgment, and happened in the 13th year of the reign of *Edward* the Second. A licence granted to certain merchants to buy and ſell in *Scotland*, which was then at war with the king of *England*, was declared to be void; and conſequently the trading held to be illegal. The other was a caſe put to the judges, in the time of Lord *Somers*, for their opinion upon the point, whether ſending corn to the enemy, in time of war and famine, was a crime at the common law. The judges held it was a miſdemeſnor. It is to be obſerved, however, that the laſt was a caſe where proviſions were ſupplied, which, as well as warlike ſtores, muſt be prohibited from the nature of the thing.

2 Roll. Abr. 173.

2 Term Rep. p. 85.

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The firſt modern caſe, in which trading with an enemy came at all under conſideration; although it did not then meet with any deciſion, was that of *Henkle* againſt the *Royal Exchange* Aſſurance Company, before Lord *Hardwicke* in the court of Chancery, which upon a former occaſion was cited much at length. His lordſhip there ſaid; it might be going too far to ſay that all trading with enemies is unlawful: for that general doctrine would go a great way, even where only

1 Vezey 317.

Vide ante, p. 1.

Engliſh

Engliſh goods are exported, and none of the enemy's imported, which might be very beneficial. He was not ſatisfied with the anſwer given to the objection of an illicit trade, by citing the caſe of the *South Sea* Company; for that by no means determined the queſtion. That was not a trading contrary to the law of this country; but contrary to the agreement of the company: which is different from a contract repugnant to the general law of the country, whether ſtatute, common, or maritime law. The ſame anſwer might be given to Sir *Robert Nightingale*'s caſe, which was merely a plea in the Exchequer, upon the private right of the company, being contrary only to their ſtatutes, and not to the general law of the land.

From this opinion, it is evident that the queſtion was by no means ſettled in Lord *Hardwicke*'s mind: but in a ſubſequent caſe, Lord *Mansfield* ſtrongly argues, that trading with an enemy is not forbidden by the general law of the country; for he ſays, that ſeveral acts of parliament have been *ſpecially* paſſed, in order to make ſuch trading illegal, which proves that the legiſlature did not think it was ſo before. The ſhip, indeed, in the laſt of theſe caſes, appeared to be neutral; and the court laid it down, that it had no where been held that an inſurance upon a neutral ſhip trading to an enemy's port was void. But then Lord *Mansfield* went upon the doctrine of a ſubject's trading with enemies, and concluded thus: by the maritime law, trading with an enemy is cauſe of confiſcation, provided you take him in the act; but this does not extend to neutral veſſels.

Gift v. Maſon, 1 Term Rep. 84.

The next queſtion which comes to be conſidered is, whether it be lawful to inſure the property of an enemy. Whatever doubts might formerly obtain in *England* either as to the legality or expediency of ſuch inſurances, the queſtion is now finally ſettled in the negative by two unanimous deciſions of the court of King's Bench.

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The firſt of thoſe caſes was an action on a policy of inſurance *on goods* on board the *Greyhound*, an *American* ſhip, at and

R. Brandon v. Neſbitt, 6 Term R. 23.

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and from *London* to *Bayonne*; there was an averment in the declaration, that the policy was effected for the benefit, and on the account, of *David Brandon*, *Iſaac* and *David Valery*, and others who were intereſted in the goods; and another averment that the ſhip was captured as prize. The defendant pleaded that the perſons, in whom the intereſt was avetred to be, were aliens born; and that, before the ſhip ſailed, they were become alien enemies of our king.

The ſecond plea ſtated, that the perſons intereſted were living in *France*, and enemies, and that the goods were ſent from *London* after the commencement of the war, for the purpoſe of being landed and delivered in *France* to the king's enemies (*a*). The replication to the firſt plea ſtated, that the perſons intereſted were indebted to the preſent plaintiff in more than the value of the goods inſured. The replication to the ſecond, that the goods inſured were not prohibited at the time of the policy, and that they were ſhipped before the commencement of the war. To theſe replications there were demurrers.

Lord *Kenyon*, in giving the opinion of the court, ſaid, that they had conſidered this caſe, and unleſs any thing more could be urged at the bar to ſhake the opinion they had formed, they were of opinion, that judgment muſt be given for the defendant, on this ground, that an action will not lie either by or in favour of an alien enemy (*b*).

(*a*) In a plea of alien enemy, the defendant muſt ſtate that the plaintiff was born in a foreign country at enmity with this country, and that he is not reſiding here under letters of ſafe conduct from the king. *Caſſeres* v. *Bell*, 8 Term Rep. 166.

34 Geo. III. c. 79. ſ. 27.

(*b*) By a late act of parliament, which paſſed "for more effectually preſerving money or effects, in the hands of his majeſty's ſubjects, belonging to, or diſpoſable by, perſons reſident in *France*, for the benefit of the individual owners thereof," commiſſioners were to be appointed for carrying the purpoſes of the act into effect: and by the 17th ſect. of the ſtatute, the commiſſioners were empowered to direct the money due on certain inſurances to be paid; and, in caſe of refuſal, actions might be brought with the approbation of the commiſſioners; and to ſuch actions ſo brought under this authority, *alien enemy* is not pleadable. But I believe no ſuch commiſſioners have ever been appointed.

This

This caſe, at firſt view, may appear to proceed merely upon the ſpecial plea; but in the ſame term another caſe was argued upon a ſpecial verdict, in which the only point diſcuſſed was the legality of inſurances on enemy's property; and the principle of the deciſion in *Brandon* v. *Neſbitt* was held ſo clearly to controul the other, that, on the authority of that deciſion, the counſel for the plaintiff abandoned the ſecond argument, which the court had ordered.

Briſtow v. Towers, 6 Term R. 35.

The ſpecial verdict ſtated, that the plaintiff, on the 13th *March* 1793, being then reſident in *Great Britain*, in purſuance of an order for that purpoſe, cauſed the inſurance in queſtion to be made on account of *Arrouet*, *Maſſot*, &c. and that *the goods* inſured were by the policy warranted *French* property, and were ſo in fact: that the goods, which conſiſted of buttons, buckles, &c. of the manufacture of this kingdom, were ſhipped on board the *Nancy*, (an *American* ſhip), on the 19th *March* 1793, by Meſſrs. *Humphreys* of *Birmingham*, in compliance with orders received in *January* 1793, from Meſſrs. *Arrouet*, *Maſſot*, &c. who were and ſtill are ſubjects of *France*: that by two orders in council of 11th *February* 1793, general repriſals were granted againſt the ſhips, goods, and ſubjects of *France*; and a general embargo was laid on all veſſels in *Great Britain*: but by another order of 26th *February* the ſaid general embargo was declared not to extend to foreign veſſels belonging to the ſubjects of any ſtate in amity with his majeſty, but that they might forthwith proceed on their reſpective voyages, provided the cargo did not conſiſt of naval or military ſtores, or any other article, the exportation whereof was prohibited by any law or order of council then in force. The verdict then ſtates the ſailing of the ſhip on the voyage inſured on the 21ſt *March* 1793, the ſubſequent capture of the veſſel by ſome *Engliſh* ſubjects, and the condemnation of *the goods inſured* as *French* property.

This ſpecial verdict was fully argued at the Bar, and a ſecond argument was ordered: but after the deciſion of *Brandon* v. *Neſbitt*, the counſel for the plaintiff ſaid, thad he declined

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trade with an enemy, which in time of peace was illegal: the two firſt claſſes would have been wholly nugatory, if the doctrine, that inſurances of this nature, were illegal, had ever prevailed. Such ſtatutes have been paſſed in every war from the reign of *Charles* the Second to the preſent time; which prove demonſtrably, that parliament conceived a legiſlative prohibition was neceſſary to make the trading illegal, otherwiſe all or moſt of the acts alluded to would have been unneceſſary and ſuperfluous.

Bynk. Quæſ. Jurif. Pub. lib. 1. cap. 3.

On the other hand it is contended by thoſe who hold the inſurance of enemy's property to be illegal and impolitic, that by the declaration of war, all commerce immediately and neceſſarily becomes prohibited between hoſtile nations; and if ſo, it follows that inſurances muſt alſo be forbidden; for it cannot be lawful to do that indirectly, which is not permitted to be done directly. Inſtances of trading with enemies to be found in writers on general law, by expreſs ſtipulation, only ſhew that governments occaſionally make exceptions from the general rule to ſuit their own convenience; and to this ſource all the ſpecial ſtatutes alluded to are referable; ſome of which too contain regulations of particular branches of commerce. Even where they extend to general prohibitions of trade with an enemy, it is for the purpoſe of ſuperadding ſpecial penalties for checking bold offenders, who are not to be deterred by the ordinary prohibitions of the law, an obſervation which fully applies to the ſtatute of 21 *Geo.* II. and to the Traiterous Correſpondence Bill lately paſſed. But all the writers upon inſurance concur in the illegality of ſuch contracts. The author of *Le Guidon*, a work of great repute, publiſhed by Monſ. *Cleirac* about the middle of the laſt century, is explicit upon the point; and the editor of the work obſerves, that this opinion is conformable to the ordinances of *Barcelona*, which paſſed ſo along ago as 1484. *Valin*, in his commentary, concurs in declaring the ſame law, and relates that by the *Engliſh* inſuring *French* property in the then laſt war, one part of the nation rendered back to *France*, what had been taken by the other *jure belli*. *Bynkerſhoek*, to whoſe writings mankind are much indebted, dedicates a whole chapter of his work to this

Le Guidon, cap. 2. ſ. 5.

Valin, liv. 3. tit. 6. art. 3.

Bynk. Q. Jur. Pub. lib. 1. cap. 21.

this ſubject, and argues ſtrongly both againſt the legality and expediency of ſuch contracts. In the only two caſes, in which the legality of trading with an enemy came in queſtion in *England* (ſee ante, p. 238.), it was held to be illegal. Even the expediency of ſuch contracts is greatly to be doubted. The *Engliſh* inſurers, who deal at a cheaper rate, and fulfil their engagements more punctually than thoſe of other nations, will, in time of peace, eaſily regain ſuch branches of that trade, as, by a prohibition during war, may be diverted into other channels. With regard to the ſuppoſed profit, that muſt ever be a matter of great uncertainty, for the premiums are not clear profit. In caſes of capture, there is no loſs to the enemy, and no gain to us: in loſſes by perils of the ſea, we bear the whole burthen, and there is actual gain to them, deducting indeed the premium in both caſes. In a national point of view, the detriment derived to us from the ſupport afforded to the commercial reſources of our enemies is beyond all computation. Our inſurers too are by this traffick rendered bad ſubjects of the country, by being intereſted againſt the ſucceſs of our own cruizers, in favour of the enemy's eſcape. The argument of procuring intelligence of the enemy' plans by theſe means is fallacious in the higheſt degree; for it never can be ſuppoſed, that underwriters would be the means of betraying the ſhips inſured into the power of our cruizers, by which they would be the greateſt ſufferers; on the other hand, the temptation muſt be very ſtrong to them to afford ſuch intelligence to the enemy of the ſailing of our armed veſſels, as may put them on their guard, and prevent them from falling into our hands. That ſuch intelligence had been given to the enemy was aſſerted as a fact in the debates in parliament in 1747; and the general law of the land will not tolerate a contract, which may lead the ſubject into ſo ſtrong a temptation to betray his duty. Even the opinions moſt favourable to this ſpecies of contract have never gone further than to contend, that inſurances upon enemy's property from a friendly or neutral port, or from one hoſtile country to another, were legal; but till the late caſes of *Brandon* v. *Neſbitt* and *Briſtow* v. *Towers*, it never was attempted to be argued, that an inſurance could legally be made

on

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on enemy's property, ſailing directly from this country to that of the enemy. Such is the ſum of the argument on both ſides of this great queſtion, which is probably now finally cloſed.

There is one ſpecies of inſurance which never could be made upon the ſhips or goods of an enemy, or even of a ſubject, and that is upon a voyage to a beſieged fort or garriſon, with a view of carrying aſſiſtance to them; or upon ammunition, other warlike ſtores, or proviſions; becauſe, from the nature of theſe commodities, they are abſolutely prohibited by the laws of all nations.

Having thus diſpoſed of theſe two important queſtions, it will be proper to conclude, by ſtating what the principle is, which is laid down in this chapter, and ſupported by authority. All inſurances upon a voyage generally prohibited by law, ſuch as to an enemy's garriſon, or upon a voyage directly contrary to an expreſs act of parliament, or to royal proclamation in time of war, are abſolutely null and void.

CHAPTER THE THIRTEENTH.

Of Prohibited Goods.

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THE ſubject of the preſent chapter is materially connected with that of the foregoing; and indeed follows as a conſequence from the doctrine there advanced. We then ſaw that a contract founded upon that which was contrary to law, could never be carried into effect. Thus by the laws of almoſt all countries, the exportation and importation of certain commodities are declared to be illegal: to act contrary to that prohibition is clearly a contempt of legal authority; and conſequently a moral wrong. If the act itſelf be illegal, the inſurance to protect ſuch an act muſt alſo be contrary to law; and therefore void. Agreeably to this principle, it ſeems to have been laid down by the writers upon the ſubject, as a general and univerſal propoſition, that an inſurance being made, although in general terms, does not comprehend prohibited goods; and therefore when the inſured ſhall procure ſuch commodities to be ſhipped, *the underwriter being ignorant of it*, by means of which the ſhip and cargo are confiſcated, the inſurer is diſcharged. In this paſſage from *Roccus* it may be inferred, that if the underwriter *knew* that the goods were prohibited, the inſurance would be valid. But we truſt, it was ſufficiently ſhewn in the preceding chapter, that that will not alter the caſe: becauſe no conſent or agreement can render a contract good and valid, which, upon the face of it, is contrary to law. In *France* this rule was adopted ſo long ago as the year 1660: for in the work of a very reſpectable writer of that age we find this paſſage: *aſſeurances ſe peuvent faire ſur toute ſorte de merchandize, pourvu que le tranſport ne ſoit pas prohibé par les edicts et ordonnances du roy*. And from an authority no leſs reſpectable, it appears that the law of *France* has undergone no alteration ſince that period; for, he ſays, "that thoſe effects, "the importation or exportation of which is prohibited in "*France*,

Lord Kaim's Prin. of Eq. 66.

Roccus de Aſſecur. No. 21.

Le Guidon, c. 2. art. 2.

Emerigon Traité des Aſſurance, tom. 1. c. 8. ſ. 5.

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" *France*, cannot be the ſubject matter of the contract of in-
" ſurance; and if they ſhould be confiſcated, the inſurers are
" not reſponſible, *even where the truth has been declared by a*
" *ſpecial clauſe in the policy*. The aſſurance is void, and no
" premium is due." This paſſage from the celebrated work juſt referred to, confirms the idea above ſtarted, with reſpect to the knowledge of the underwriter.

The law of *England*, whoſe commercial regulations have ſurpaſſed thoſe of every other nation in the world, has alſo introduced ſuch a rule into its ſyſtem of mercantile juriſprudence: and the oldeſt writers upon the ſubject have taken notice of it. It is ſaid, " if prohibited goods are laden aboard,
" and the merchant inſures upon the general policy, it is a
" queſtion whether if ſuch goods be lawfully ſeized as prohi-
" bited goods, the inſurers ought to anſwer. It is conceived
" they ought not: for if the goods are at the time of the
" lading unlawful, and the lader knew of the ſame, ſuch
" aſſurance will not oblige the inſurer to anſwer the loſs; for
" the ſame is not ſuch an aſſurance as the law ſupports, but
" a fraudulent one."

Molloy, lib. 2. c. 7. ſ. 15.

But it is not upon the opinions of learned men merely, that this doctrine is founded in the *Engliſh* law; for the legiſlature have by poſitive ſtatutes declared their ideas upon the ſubject. It appears from the preamble to that ſection of the ſtatute about to be quoted, that a cuſtom, highly prejudicial to the revenue of the country had prevailed, and was encreaſing to a very alarming degree, of importing great quantities of goods from foreign ſtates in a fraudulent and clandeſtine manner, without paying the cuſtoms and duties payable to the crown: and that this evil had been encouraged and promoted by ſome ill deſigning men, who, in defiance of the laws, had undertaken as inſurers, or otherwiſe, to deliver ſuch goods ſo clandeſtinely imported, at their charge and hazard, into the houſes, warehouſes, or poſſeſſion, of the owners of ſuch goods. In order to remedy this miſchief, it was enacted, " that all and every
" perſon and perſons, who, by way of inſurance or otherwiſe,
" ſhould undertake or agree to deliver any goods, wares, or
" merchandizes

4 and 5 W. and M. c. 15. ſ. 14, 15, 16. 500 l. penalty on perſons inſuring to import prohibited goods.

" merchandizes whatſoever, to be imported from parts beyond " the ſeas, at any port or place whatſoever within this king- " dom of *England*, dominion of *Wales*, or town of *Berwick* " *upon Tweed*, without paying the duties and cuſtoms that " ſhould be due and payable for the ſame at ſuch importation, " *or any prohibited goods whatſoever*; or in purſuance of ſuch " inſurance, undertaking, or agreement, ſhould deliver, or cauſe " or procure to be delivered, any prohibited goods, or ſhould " deliver, or cauſe or procure to be delivered, any goods or mer- " chandizes whatſoever, without paying ſuch duties and cuſtoms " as aforeſaid, knowing thereof, and all and every their aiders, " abettors, and aſſiſtants, ſhould for every ſuch offence forfeit " and loſe the ſum of *five hundred pounds*, over and above all " other forfeitures and penalties, to which they are liable by " any act already in force." It was alſo enacted, " that all " and every perſon and perſons, who ſhould agree to pay any " ſum or ſums of money for the inſuring or conveying any " goods or merchandizes that ſhould be ſo imported, without " paying the cuſtoms and duties due and payable at the im- " portation thereof, or of any prohibited goods whatſoever, or " ſhould receive or take ſuch prohibited goods into his or their " houſe or warehouſe, or other place on land, or ſuch other " goods before ſuch cuſtoms or duties were paid, knowing " thereof, ſhould alſo for every ſuch offence forfeit and loſe " the like ſum of five hundred pounds; the one half of the " ſaid forfeitures to be to their majeſties, and the other half to " the informer, or to ſuch perſons as ſhould ſue for the ſame. " And if the inſurer, conveyor, or manager of ſuch fraud " ſhould be the diſcoverer of the ſame, he ſhould not only " keep the inſurance money or reward given him, and be diſ- " charged of the penalties to which he was liable by reaſon of " ſuch offence, but ſhould alſo have to his own uſe one half " of the forfeitures hereby impoſed upon the party or parties " making ſuch inſurance or agreement, or receiving the goods " as aforeſaid: and in caſe no diſcovery ſhould be made by " the inſurer, conveyor, or manager as aforeſaid, and the " party or parties inſured or concerned in ſuch agreement " ſhould make diſcovery thereof, he ſhould recover and receive

Sect. 15. Like penalty on the inſured.

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"back such insurance money or premium as he had paid "upon such insurance or agreement, and should have to his "own use one moiety of the forfeitures imposed upon such "insurer, conveyor, or manager as aforesaid, and should also [247] "be discharged of the forfeitures hereby imposed upon him "or them."

A few years afterwards, lustrings, the manufacture of which till then was little known in *England*, having been worked to great perfection by the Royal Lustring Company, the legislature found it necessary to protect this branch of trade, by prohibiting the importation of such silks from foreign countries into this, without paying the duties, whether by direct means, or by the way of insurance. It was enacted, "that every 8 and 9 W. 3. c. 36. s. 1. "person, who should import any foreign alamodes or lustrings "from parts beyond the seas, into any port or place within "the kingdom of *England*, dominion of *Wales*, &c. without "paying the rates, customs, impositions, and duties, that "should be due and payable for the same at such importation, "or should import any alamodes or lustrings, prohibited by "law to be imported, or should, by way of insurance or "otherwise, undertake or agree to deliver, or in pursuance "of any undertaking, agreement, or insurance, should deliver, "or cause to be delivered, any such goods or merchandize, "and every person who should agree to pay any sum or sums "of money, premium, or reward for insuring or conveying "any such goods or merchandize, or should knowingly take "or receive the same into his, her, or their house, shop, or "warehouse, custody or possession, such person or persons "should and might be prosecuted for any of the offences or "matters aforesaid, in any action, suit, or information."

Sect. 2. The second section of this statute enables persons to sue for the penalties imposed by the former act of *William* and *Mary* by action of debt, bill, plaint, or information, in any of his majesty's courts of record at *Westminster*.

Mir. c. 1. s. 3. 11 Ed. 3. c. 1. 8 Eliz. c. 3. Wool being the staple manufacture of this kingdom, it was always deemed a heinous offence to transport it out of the realm: for

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for we find it was forbidden at the common law; and afterwards more expreſsly in the reign of *Edward* the Third, ſince which period this branch of trade has been much attended to, and any offences againſt it have met with corporal and pecuniary puniſhments by ſeveral ſubſequent ſtatutes. This being the caſe, an inſurance upon wool ſo to be exported muſt have been void; becauſe the very foundation of the contract was contrary to law. But notwithſtanding theſe reſtrictions, the practice of exporting wool became ſo frequent, as well as the practice of inſuring ſuch cargoes, and undertaking to deliver them ſafely abroad, that it became neceſſary for the legiſlature to interpoſe, and by a new declaration of the law, and the impoſition of a heavy penalty, to endeavour to check the growing evil. Accordingly it was enacted, "that every perſon, "who, by way of inſurance or otherwiſe, ſhould undertake or "agree, that any wool, wool-fells, wool-flocks, mortlings, "ſhortlings, worſted, &c. ſhould be carried or conveyed to "any parts beyond the ſeas from any port or place whatſoever "within this kingdom or *Ireland*: or in purſuance of ſuch in-"ſurance, undertaking, or agreement, ſhould deliver, or cauſe "to be delivered, any of the ſaid goods in parts beyond the "ſeas, ſuch perſon, and all and every his aiders, &c. ſhould for "every ſuch offence forfeit and loſe the ſum of five hundred "pounds." The next ſection inflicts a like penalty on the inſured: and the following one, in order to encourage the parties to diſcloſe ſuch contracts, releaſes the party informing from all the penalties, to which he himſelf was ſubject, and alſo gives him the whole of the forfeiture, after deducting the charges of the proſecution.

12 Car. 2. c. 32. 7 and 8 W. 3. c. 28. 4 G. 1. c. 11.

12 Geo. II. c. 21. ſ. 29.

500 l. penalty on the inſurer who inſures or procures wool to be landed in foreign parts.

Sect. 30.

Sect. 31.

But in order wholly to prevent this illicit exportation of wool, it was neceſſary for the legiſlature to go one ſtep further: becauſe as policies are frequently made on goods, as well as on ſhips, in which the inſurer undertakes, in conſideration of the premium, to bear all the riſks and hazards of the voyage; and as it is generally unknown to the inſurers what ſorts of goods are loaded on board any ſhip or veſſel, it happened that inſurances were made on wool or woollen yarn to be carried from *Great Britain* or *Ireland* to foreign ports, or on woollen manufactures

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to be carried from *Ireland*. Therefore it was declared, "that "all policies of inſurance, which ſhould be made on goods and "merchandizes, loaden or to be loaden, on any ſhip or veſſel "bound from *Great Britain* or *Ireland* to foreign parts beyond "the ſeas, which ſhould afterwards appear to be wool or woollen "yarn, or any other ſpecies of wool, or woollen manufactures "from *Ireland*; and all policies of inſurance which ſhould be "made on any ſhip or veſſel bound from *Great Britain* or "*Ireland* to foreign parts beyond the ſeas, which ſhould have "on board any wool or woollen yarn, or any other ſpecies "of wool or woollen manufactures from *Ireland*, ſhould be "deemed and taken to be null and void, notwithſtanding any "words or agreement whatſoever, which ſhould be inſerted "in any ſuch policy of inſurance; and nothing ſhould be re-"covered by the aſſured in either caſe for loſs or damage, or "for the premium which ſhould have been given as the con-"ſideration for inſuring ſuch goods and merchandizes, ſhip or "veſſel."

Same act. ſ. 33. Inſurances on woollen goods void.

This latter act, as far as relates to *Ireland*, has been repealed by a ſubſequent ſtatute of 20 *Geo.* 3. *c.* 6.

28 Geo. 3. c. 38. In a late ſeſſion of parliament an act paſſed for reducing all the laws relative to the exportation of wool into one ſtatute; and for the firſt offence of that ſort inflicts a penalty of 50 *l.* with ſix months ſolitary impriſonment for exporting wool, *&c.* The

Sect. 45. 45th ſection of that ſtatute declares that, "every perſon or "perſons who, by way of inſurance or otherwiſe, ſhall under-"take or agree that any ſheep, wool, or any other of the enu-"merated articles in the ſtatute, ſhall be carried or conveyed "to any parts beyond the ſeas, from any port or place whatſo-"ever within this kingdom, or in purſuance of ſuch under-"taking or agreement, ſhall deliver, or cauſe or procure to be "delivered, any ſheep, wool, *&c.* in parts beyond the ſeas, ſuch "perſon or perſons, their aiders and abettors, ſhall upon con-"viction be liable to the ſame puniſhment as the exporters."

Sect. 46. The next ſection inflicts a like penalty upon the perſons paying for ſuch inſurance.

But

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But as insurances are frequently made on goods, the insurer not knowing what the goods are, it is declared that "all policies of insurance which shall be made on goods and merchandizes, laden or to be laden on any ship or vessel bound from *Great Britain* to foreign parts, which shall afterwards appear to be wool, woollen, or worsted yarn, &c. shall be deemed and taken to be null and void, notwithstanding any words or agreement whatsoever, which shall be inserted in such policy of insurance, and nothing shall be recovered by the assured from the insurer for loss or damage, or for the premium which shall have been given as the consideration for such insurance." Sect. 48.

From an attentive review of these statutes, the idea of the *British* parliament may be clearly and decidedly collected: and the statutes just referred to are the most general in their import that could be found upon the subject; and consequently the most proper to be mentioned here.

The question naturally occurs, what goods come under the description of prohibited goods, so as to render an insurance upon them void. To mention by name all the different kinds of merchandize, which fall under that description, would be tedious; and, as it should seem, wholly unnecessary. Thus much may be laid down as a general proposition, that all insurances upon goods, forbidden to be exported or imported, by positive statutes, by the general rules of our municipal law, or by the king's proclamation *in time of war*; or which, from the nature of the commodity, and by the laws of nations, must necessarily be contraband, are absolutely null and void. Under the first division may be ranked all offences against the revenue laws of this country; and therefore if an insurance were made in order to protect smuggled goods, such insurance would doubtless be of no effect. To this head also may be referred any breach of the navigation acts, which were established for the protection, encouragement, and advancement of our commercial and naval interests; and which have produced those effects to the wonderful extension of our commerce, and the aggrandizement of the nation. At a very early 5 Rich. 2. c. 3.

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period of the history of this country, several wise provisions were made by parliament, solely with this view: but on account of the low state of commerce in those ages, which was the more depressed, by the warlike spirit of the nation, and the intestine commotions that agitated and disturbed the state, those

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provisions in some measure failed of their effect. But the most beneficial statute for the trade and commerce of *England* is the famous navigation act, which passed soon after the restoration of *Charles* the second; the outlines of which were first framed, in the time of the commonwealth, by *Oliver Cromwell*.

Scobel, 132.

By the reports of historians, we do not find that he framed it with any view to those beneficial effects, which sprung from it, but with a partial and confined intention, being designed by him to mortify our own sugar islands, which were disaffected to the parliament, and held out for the king, by stopping the lucrative trade, which they then held with the *Dutch*. Another motive for his conduct was this, that as the *Dutch* were at that time rising into opulence and wealth, and had given him disgust; and as their commerce did not consist so much in the produce of their own country (which afforded but few commodities) as in being the general carriers and factors of *Europe*, he had it in his power to affect their trade in a considerable degree, by prohibiting all nations from importing into *England* in their own bottoms any commodity, which was not the growth and manufacture of their own country. At the restoration, however, those plans, the good effects of which had probably been experienced, were adopted by the legal and real constitution of the country, and were considerably improved by inserting clauses, which had been overlooked and omitted in the original design, or which time and experience had pointed out as necessary to the completion of that system, the beneficial effects of which are at this day most sensibly felt. It is not wholly impertinent in a work like the present to state briefly the outlines of a statute, so considerably affecting the commercial interests of the nation, and which has served as the groundwork of all subsequent laws for the good management of *British* navigation.

7 Hume's Hist. of Eng. 211.

12 Car. II. c. 18. s. 1.

The first section of the act declares, "that no goods shall be "imported into, or exported out of, any plantations or territories

"to

" to his majeſty belonging in *Aſia*, *Africa*, or *America*, but in ſuch ſhips only as belong to the people of *England* or *Ireland*, *Wales* or *Berwick*, or are of the built of, and belonging to, any of the ſaid territories, as the proprietors thereof, and whereof the maſter, and three-fourths of the mariners are *Engliſh*, (which word, by a ſubſequent ſtatute, 13 and 14 *Car.* II. ch. 11. §. 6. was explained to mean his majeſty's ſubjects of *England*, *Ireland*, and his plantations generally), under penalty of the forfeiture of all the goods and commodities which ſhall be imported into, or exported out of, any of the ſaid places, in any other ſhip or veſſel, as alſo of the ſhip and veſſel." 8 & 9 W. III. c. 22. [252]

It is alſo declared, " that no goods of the growth, manufacture, or production, of *Africa*, *Aſia*, or *America*, be imported into *England*, *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*, in any other ſhips than ſuch as belong to the people of *England*, *Ireland*, *Wales*, or *Berwick*, or of the plantations to his majeſty belonging, as the proprietors thereof, and whereof the maſter and three-fourths of the mariners are *Engliſh*, under the penalty of the forfeiture of all ſuch goods, and of the ſhip." Sect. 3.

See an act of 2 W. and M. ſ. 1. c. 9. prohibiting the importation of thrown ſilk.

" No goods of foreign growth, production, or manufacture, which are to be brought into *England*, *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*, in *Engliſh*-built ſhipping, or other ſhipping belonging to ſome of the aforeſaid places, and navigated by *Engliſh* mariners as aforeſaid, ſhall be brought from any other places but thoſe of the growth or manufacture, or from thoſe ports where the goods are firſt uſually ſhipped for tranſportation, under the penalty of the forfeiture of all ſuch goods, as ſhall be imported from any other place, as alſo of the ſaid ſhip." Sect. 4.

This ſection was altered as to the importation of American drugs by 7 Anne, c. 5. ſ. 12.

" It ſhall not be lawful to load in any ſhips, whereof any ſtranger or ſtrangers born (unleſs ſuch as be denizens, or naturalized) be owners, part owners, or maſter, whereof three-fourths of the mariners, at leaſt, ſhall not be *Engliſh*, any fiſh, victual, goods, and merchandizes, from one port or creek of *England*, *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*, to another port or creek of the ſame, under penalty, and forfeiture of all ſuch goods, together with the ſhip or veſſel." Sect. 6.

" Where

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Sect. 7.

" Where any privilege is given by the book of rates to goods " or commodities exported or imported in *Engliſh*-built ſhip- " ping, that is to ſay, ſhipping built in *England*, *Ireland*, *Wales*, " *Guernſey*, *Jerſey*, *Berwick*, or in any of the lands, dominions, " and territories, belonging to his majeſty, in *Africa*, *Aſia*, or " *America*, that it always is to be underſtood, that the maſter " and three-fourths of the mariners be *Engliſh*; and where it " is required that the maſter and three-fourths of the mariners [253] " be *Engliſh*, the true intent thereof is, that they ſhould con- " tinue ſuch during the whole voyage, unleſs in caſe of ſickneſs, " death, or being taken priſoners in the voyage, to be proved " by the oath of the maſter or chief officer of the ſhip."

Sect. 8.

The eighth ſection prohibits the importation of goods of the growth of *Muſcovy*, *Ruſſia*, or the *Ottoman* or *Turkiſh* empire into *England*, except in *Engliſh*-built ſhips, whereof the maſter and three-fourths of the mariners muſt alſo be *Engliſh*, under the penalty of forfeiting both ſhip and goods.

Sect. 9. Upon this ſect. ſee 13 and 14 Car. 2. c. 11. ſ. 23. 6 Geo. 1. c. 15. ſ. 1.

And for preventing the practice of *colouring* aliens goods, the ninth ſection declares, that all wines of the growth of *France* or *Germany* imported in any other than *Engliſh* veſſels, ſhall be deemed aliens goods, and pay all ſtrangers cuſtoms, and duties: which proviſion is extended to certain commodities, named in the act, of the growth of *Spain*, the *Canaries*, *Madeira*, *Portugal*, or the Weſtern Iſlands, and of *Muſcovy*, *Ruſſia*, and *Turkey*.

Sect. 10.

It was alſo ordained by the next ſubſequent ſection of the ſtatute, in order to prevent the colouring or buying of foreign ſhips, that no foreign ſhip ſhould paſs as a ſhip to *England*, *Ireland*, *Wales*, or *Berwick*, until thoſe claiming the ſaid ſhip ſhould make appear to the chief officer of the cuſtoms that they were not aliens, and ſhould have taken an oath, that ſuch ſhip was *bonâ fide*, and without fraud, by them bought for a valuable conſideration, expreſſing the ſum, and alſo the time, place, and perſons, from whom it was bought, and who were the part owners: upon which oath that they ſhould receive a certificate, whereby ſuch ſhip ſhould in future paſs, and be deemed a ſhip belonging to the ſaid port, where the oath was ſo taken, and receive the privileges of ſuch ſhip. The officers

Sect. 11. V. 6 Anne, c. 37. ſ. 21.

of

of the cuſtoms are not to allow any privilege to any foreign-built ſhip, until certificate granted, or proof of thoſe things required by this act. By the 13th ſection it is provided, that this act is not intended to reſtrain the importation of any *Eaſt India* commodities, loaden in *Engliſh*-built ſhipping, whereof the maſter and three-fourths of the mariners are *Engliſh*, from the uſual place of loading in thoſe ſeas, to the ſouthward and eaſtward of the *Cape of Good Hope*, although the ſaid ports be not the very places of their growth. There is alſo a proviſion in favour of goods imported from *Spain*, *Portugal*, the *Azores*, *Madeira* or *Canary* iſlands; and concerning goods and commodities from *Scotland*, and ſeal oil from *Ruſſia*. The 17th ſection impoſes a duty upon every *French* ſhip coming into *England*. And it was laſtly enacted, that the ſhips of *England*, *Ireland*, *Wales*, or *Berwick*, ſailing to any *Engliſh* plantations in *Aſia*, *Africa*, or *America*, ſhould be bound in ſufficient ſureties, in proportion to the burthen of the ſhip, to bring the goods loaded at ſuch plantations into *England*.

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Sect. 14 and 16.

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Such were the proviſions of this famous ſtatute, framed by the wiſdom of our anceſtors for the promotion of our naval and maritime ſtrength: upon this ſtatute have all ſubſequent commercial regulations been eſtabliſhed; and from this ſource they have derived ſolidity and ſtrength. But in vain have ſuch rules been framed, if inſurances upon the importation or exportation of the commodities mentioned in theſe ſtatutes are to be tolerated. It would be to render void theſe good and wiſe plans, and to ſet the acts of the legiſlature at defiance. The concluſion is, that ſuch inſurances are abſolutely null, and of no effect.

It was ſaid, in a former part of this chapter, that an inſurance upon any goods, the exportation or importation of which was forbidden by the royal proclamation in time of war, was equally void, as if prohibited by ſtatute. The reaſon of this is, that the king's proclamation in time of war has equal force with an act of parliament, and is no leſs binding upon his ſubjects. The conſequence of this doctrine is, that the breach of ſuch a prohibition is equally criminal with the breach of

1 Black. Com. 270.

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of a ſtatute; and no contract can be founded upon ſuch criminal act, or have any validity. Theſe principles were fully conſidered in the preceding chapter; and the law upon the ſubject was clearly ſettled in the caſe of *Delmada* v. *Motteux*, there cited at length; in which it was held, that the king had an undoubted right to lay on an embargo in time of war: that the conſequence of a breach of ſuch a proclamation had not been fully aſcertained, but it was certainly a criminal act; and wherever a man makes an illegal contract, the courts of juſtice will not lend him their aid to compel a performance. The underwriter was accordingly diſcharged from the demand ſet up againſt him.

Delmada v. Motteux, B. R. Mich. 25 Geo. 3. Vide ante, p. 234.

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We come now to conſider thoſe commodities which, from their nature, as well as by the laws of nations, are contraband. Upon this occaſion *Grotius* and *Bynkerſhoek* are the beſt guides that can poſſibly be followed; and from them we may collect, that it is unlawful to carry any thing to beſieged cities or fortreſſes: a rule which they declare to have been eſtabliſhed by common conſent, and the uſage of all nations. *Grotius* divides goods into three kinds: ſuch as can only be of uſe in time of war; and theſe are clearly contraband, ſuch as arms and ammunition: 2dly, Such as anſwer no purpoſe in war, and are merely intended for pleaſure; and theſe may be lawfully conveyed to an enemy. But the third kind are of a mixed nature, ſuch as money, proviſions, ſhips, and the materials of ſhips; in which caſe, before we can decide upon the propriety of exporting ſuch commodities, the ſituation of the war between the contending parties is to be conſidered. Upon this point his reaſoning is excellent: "If," ſays he, "I cannot defend myſelf without intercepting the commodities intended "for my enemies, neceſſity will give me the right, but ſtill I "ſhall be liable to make reſtitution, unleſs ſome other cauſe of "ſeizure appears. For if the conveyance of ſuch commodities to the enemy ſhall prevent the execution of my plans, "and he who carried them knew that I had beſieged or blockaded the town, and that peace or a ſurrender was expected, "he ſhall be anſwerable for the loſs ſuſtained by his miſconduct." With this opinion *Bynkerſhoek* for the moſt part coincides:

Grotius, lib. 3. c. 1. Bynk. lib. 1. c. 11.

Lib. 3. c. 1. ſ. 5.

L. 1. c. 11.

incides: becauſe, as he obſerves, the ſiege alone is the cauſe why it is not lawful to carry any thing to the beſieged, whether it be contraband or not: for a beſieged city is never compelled to ſurrender by force, but by famine, and the want of other neceſſaries. If it were to be permitted to ſupply them with the things of which they ſtand in need, perhaps the aſſailants would be obliged to raiſe the ſiege. But as it is impoſſible to ſay of what things the beſieged ſtand in need, or in what they abound, every ſpecies of commodity is forbidden to be carried into the garriſon; for otherwiſe there would be no certain rule of ſettling diſputes. This learned author, however, differs from *Grotius*, in that paſſage where he ſays, "the carrier of goods "ſhall be anſwerable, if peace or a ſurrender was expected, "and it was fruſtrated by ſuch means." *Bynkerſhoek* is of opinion, that ſuch doctrine is neither conſonant to reaſon, nor to the agreements entered into by the laws of nations. He reaſons thus; "Quæ ratio me arbitrum conſtituit de futurâ "deditione aut pace? et ſi neutra expectetur, jam licet obſeſſis "quælibet advehere? imo nunquam licet, durante obſidione, et "amici non eſt cauſam amici perdere, vel quoquo modo dete-"riorem facere. Et qui advexit, non ultra tenebitur, quam "de damno culpâ dato? atquin in ſubditis id ſemper capitale "fuit, quin et in amicis, edicto ante monitis, ſæpe et in non "monitis. Rurſus, ſi quis nondum advexit, ſed, dum adve-"here voluit, deprehendatur, ſola rerum interceptarum re-"tentione erimus contenti, idque donec caveatur, nihil tale "in poſterum commiſſum iri?" He concludes thus: "I do "not agree to that opinion, having learnt from the cuſtom "and uſages of all nations, to ſell all intercepted goods, and "often to inflict, if not a capital, at leaſt a corporal puniſh-"ment."

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Such are the opinions of theſe two very learned writers, who, although in ſome reſpects they differ, agree in eſtabliſh-ing this as a ſettled, undiſputed rule, that whoever conveys any neceſſaries to a beſieged town, camp, or port, is guilty of a breach of the law of nations. This being the caſe, an inſurance upon ſuch commodities muſt neceſſarily be void, and

Grot. Bynk. loc. cit.

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and of no effect, agreeably to the principles which have already been advanced.

One queſtion only remains to be conſidered; how far inſurances upon goods, the exportation and importation of which are forbidden by the laws of other countries, are valid? In *England*, the law is clear, as it has been laid down by two very great judges, that ſuch inſurances are good; becauſe the foundation of the contract is not illicit. It has been expreſsly held by Lord *Mansfield* more than once, in which he has been confirmed by the whole court of King's Bench, that one nation never takes notice of the revenue laws of another; and therefore ſuch an inſurance was certainly good and valid. A ſimilar opinion ſeems to have been entertained by Lord *Hardwicke*; at leaſt ſo much may be collected from his argument, in a caſe reported in *Vezey*.

Vide ante, p. 195. Doug. 238.

1 Vezey, 319.

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But although this point is ſo clearly ſettled by the law of *England*, in which alſo the law of *France* coincides, it is certain that the expediency of it has been a queſtion which has very much engaged the attention of ſome conſiderable *French* authors. Their opinions can in no way affect the law of *England*, which ſtands upon much higher authority than the ſentiments of ſpeculative men, however reſpectable; but it may be productive of ſome amuſement, if not inſtruction, to ſee by what arguments the two different opinions are ſupported.

1 Emerigon, p. 210.

Thoſe who contend that ſuch inſurances are illegal, argue in this manner: that they who carry on commerce in a country, are obliged, by the cuſtom of nations, and natural law, to conform to the laws of that country where they trade. Every ſovereign has power and juriſdiction over every thing done in the country, where he has a right to command; he has conſequently a right to make laws, relative to commerce within his dominions, which bind all thoſe who trade, as well ſtrangers as ſubjects. No one can diſpute with the ſovereign, the right he has to retain in his own country certain merchandizes which are there to be found, and to prohibit the exportation of them.

Pothier Tr. d'Aſſurances, c. 1. ſ. 2. art. 2. ſ. 2.

them. To export them contrary to his orders, is to ſtrike a blow at his undoubted authority; and conſequently it is unjuſt. But admitting, ſay they, that a *Frenchman* would not himſelf be ſubject to the law of *Spain*, for the trade which he carries on in *Spain*, it cannot be denied that the *Spaniards*, whoſe aſſiſtance he requires, are ſubject to thoſe laws; and that they offend extremely in aſſiſting him to export that, the exportation of which is prohibited by law. This ſpecies of trade then is to be conſidered as illicit, and contrary to good faith; and conſequently the contract of inſurance, introduced in order to protect it, by charging the inſurer with the riſk of confiſcation, is illicit, and cannot induce any obligation.

Thoſe who ſupport the oppoſite doctrine contend, that the exportation or importation of commodities prohibited by foreign laws is no offence; and that the means employed to effect it are regarded by the law, as a laudable and ingenious exertion of ſkill. Thus the exportation of certain commodities is prohibited in *Spain*, which the government of that country has a right to do: but the laws of his Catholick Majeſty are not the rule of action for *Frenchmen*. It is allowed them to bring from *Spain* into *France* piaſtres, piſtoles, and ſilks, for the ſupport of the Banks, the manufactures, and the commerce of that country. Theſe merchandizes are a lawful branch of trade; and there is no reaſon why they ſhould not be the ſubject matter of a contract of inſurance. But above all, they inſiſt, that they are juſtified by the conſtant cuſtom; and that the reaſoners on the other ſide ought to be leſs ſtrict, when it is conſidered, that this contraband trade is a vice common to all commercial nations. The *Spaniards* and *Engliſh* in time of peace practiſe it in *France*: it is therefore permitted to carry it on in their reſpective countries, by way of reprisal.

2 Val.Com.129. 1Emerigon 212.

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Whatever difference there may be on the queſtion of expediency; it is univerſally admitted by the *French* writers, that inſurances upon ſuch goods are valid. We have already ſeen that the ſame ideas have been adopted by the law of *England*;

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land; and that every policy upon goods, the exportation and importation of which is not prohibited by the municipal laws of this country, or by the general laws of nations, is legal and binding upon the parties; and the underwriter muſt anſwer for every loſs ariſing by means of any of the uſual perils.

CHAPTER THE FOURTEENTH.

Of Wager-Policies.

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HAVING in the four preceding chapters ſtated the various caſes, in which the contract of inſurance is void from its very commencement, on account of its repugnancy to thoſe principles of juſtice, equity, and good faith, which are the great foundation of all contracts between man and man; we proceed to treat of thoſe policies, which by the poſitive ſtatute law of the country are declared to be abſolutely null and void. Of theſe the largeſt claſs are wager-policies, or policies as they are called, upon intereſt or no intereſt.

The nature of the contract of inſurance, in its original ſtate, was, that a ſpecifick voyage ſhould be performed free from perils; and in caſe of accidents, during ſuch voyage, the inſurer, in conſideration of the premium he received, was to bear the merchant harmleſs. It followed from thence, that the contract related to the ſafety of the voyage thus particularly deſcribed, in reſpect either of ſhip or cargo: and that the perſon inſured could not recover beyond the amount of his real loſs.

In proceſs of time, however, variations were made, by expreſs agreement, from the firſt kind of policy; and in caſes where the trader did not think it proper to diſcloſe the nature of his intereſt, the inſurer diſpenſed with the inſured having any intereſt either in the ſhip or cargo. In this laſt kind of policy (of which we are now to treat) "valued free from average," and "intereſt or no intereſt," it is manifeſt, that the performance of the voyage or adventure, in a reaſonable time and manner, and not the bare exiſtence of the ſhip or cargo, is the object of the inſurance.

Such an object as that, from a reference to the real nature of an inſurance, as ſtated in the outſet of the chapter, namely, that it is a contract of indemnity from a real and manifeſt, not from

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a ſuppoſed and ideal loſs, muſt have been originally bad. Indeed it has been declared from the bench, in the reign of queen *Anne*, that ſuch inſurances were *formerly* bad; for it is ſaid in that caſe, that in former times, if one had no intereſt, though the policy ran, *intereſt or no intereſt*, the inſurance was void; becauſe inſurances were made for the benefit of trade, and not that perſons unconcerned therein, or unintereſted in the ſubject matter, ſhould profit by them.

Affievedo v. Cambridge, 10 Mod. 77.

The idea thus ſtarted is very much confirmed by what fell from the court in the caſe of *Depaiba* v. *Ludlow*: for the court there obſerved, that inſurances upon intereſt or no intereſt were introduced *ſince* the revolution.

Depaiba v. Ludlow, Comyns Rep. 360.

Taking it for granted then, that the law of *England* in this reſpect, previous to the revolution, was ſuch, as theſe caſes ſuppoſe it to be, it was perfectly conſonant to the laws of moſt of the commercial ſtates and countries in *Europe*. For we find that by poſitive regulations of *Middlebourg*, *Genoa*, *Konyngſburg*, *Rotterdam*, and *Stockholm*, all inſurances upon wagers, or as intereſt or no intereſt, are declared to be abſolutely void, and of no effect.

2 Mag. 70. 65. 88. 189. 257.

But though this mode of inſuring thus gained a footing in *England*, yet when introduced, the courts of juſtice looked upon theſe contracts with a jealous eye; and by their determinations ſhewed the ſtrong prejudices which they entertained againſt them. The courts of Equity in particular manifeſted that their inclination would lead them as much as poſſible to ſuppreſs ſuch a ſpecies of contract: nay, that they ſtill conſidered them as void. This is evident from two caſes in *Vernon*'s Reports.

In one of them, the defendant had lent money on a bottomry bond, but had no intereſt in the ſhip or cargo; the money lent was 300 *l.* and he inſured 450 *l.* on the ſhip: the plaintiff's bill was to have the policy delivered up, becauſe the defendant was not concerned in point of intereſt, as to the ſhip or cargo.

Goddart v. Garrett, 2 Vern. 269. Trin. Term, 1692.

Per

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Per curiam. Take it that the law is ſettled, that if a man has no intereſt, and inſures, the inſurance is void, though it be expreſſed in the policy, *intereſted or not intereſted.* The reaſon the law goes upon is, that inſurances were made for the benefit of trade, and not that perſons unconcerned therein, and who were not intereſted in the ſhip, ſhould profit thereby; and *where one would have the benefit of the inſurance, he muſt renounce all intereſt in the ſhip.* And the reaſon why the law allows that a man having ſome intereſt in the ſhip or cargo, may inſure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readineſs to lade on board his ſhip. *Per Cur.* Decree the policy to be delivered up to be cancelled.

From the ſpirit of this deciſion, it may likewiſe appear, that the court of Chancery inclined to think, that an inſurance made without the benefit of ſalvage to the inſurer, was unconſcientious, and a proper ſubject for relief in equity; for the Chancellor expreſsly ſays, where one would have the benefit of the inſurance, he muſt renounce all intereſt in the ſhip.

In another caſe alſo, which was on a policy of inſurance on goods, by agreement valued at 600 *l.* and the inſured not to be obliged to prove any intereſt: the Lord Chancellor ordered the defendant to diſcover what goods he put on board; for although the defendant offered to renounce all intereſt to the inſurers, yet it muſt be referred to the Maſter to examine the value of the goods ſaved, and to deduct it out of the value or ſum of 600 *l.* at which the goods were valued by the agreement.

LePypre v. Fatt, 2 Vern. 716. In Chancery, Mich. Term, 1716.

There was one very remarkable difference between policies upon intereſt, and ſuch as were not, of which I believe notice has already been taken in a former part of this work: namely, that in policies upon intereſt, you recover for the loſs actually ſuſtained, whether it be total or partial: but upon a wager-policy, you can never recover but for a total loſs. All the doctrine, which turns upon this diſtinction between intereſt and wager-policies was conſidered at much length by Lord

2 Burr. 683. Vide ante, p. 150.

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Mansfield in the famous cauſe of *Goſs* v. *Withers*, to which we have had occaſion more than once to refer.

Vide ante, c. 1. p. 8, 9.

It has already been obſerved, that the ſecurity given to the inſured was very conſiderably encreaſed by the erection of two Aſſurance Companies, which were incorporated by royal charter in the year 1720; for the legiſlature had taken care that

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thoſe corporations ſhould have ſufficient funds to anſwer any demands, that might be made upon them, in the common courſe of buſineſs. But this additional ſecurity for the inſured ſoon produced many dangerous and alarming conſequences, which, if they had not been checked, would have proved very detrimental to the trade of this country. For inſtead of confining the buſineſs of inſurances to real riſks, and conſidering them merely as an indemnity to the fair dealer againſt any loſs, which he might ſuſtain in the courſe of a trading voyage, which, as we have ſeen, was the original deſign of them; that practice, which only prevailed ſince the revolution, of inſuring ideal riſks, under the names of *intereſt or no intereſt*, *or without further proof of intereſt than the policy*, *or without benefit of ſalvage to the underwriters*, was encreaſing to an alarming degree, and by ſuch rapid ſtrides as to threaten the ſpeedy annihilation of that lucrative and moſt beneficial branch of trade. All theſe various kinds of inſurance juſt enumerated, (and many others, which the ingenuity of bad men found no difficulty in deviſing), having no reference whatever to actual trade or commerce, were very juſtly conſidered as mere gaming or wager-policies: and therefore the legiſlature thought it neceſſary to give them an effectual check, and, by poſitive rules, to fix and aſcertain what property or intereſt a merchant ſhould be permitted to inſure.

Accordingly an act of parliament, paſſed in the 19th year of the reign of king *George* the Second, intitled, "an act to regu- "late inſurance on ſhips belonging to the ſubjects of *Great* "*Britain*, and on merchandizes or effects laden thereon." As this act is the moſt important and moſt extenſive in the whole code of ſtatute law, with regard to inſurances, I ſhall now cite as much of it at length, as relates to the preſent

chapter, and afterwards the other clauſes of it under thoſe heads, to which they more immediately apply. CHAP. XIV.

The cauſes, which co-operated to induce the legiſlative body to paſs ſuch an act, are fully ſtated in the preamble. "Whereas "it hath been found by experience, that the making aſſurances, "intereſt or no intereſt, or without further proof of intereſt "than the policy, hath been productive of many pernicious "practices, whereby great numbers of ſhips, with their car- "goes, have either been fraudulently loſt and deſtroyed, or "taken by the enemy in time of war; and ſuch aſſurances [263] "have encouraged the exportation of wool, and the carrying "on many other prohibited and clandeſtine trades, which by "means of ſuch aſſurances have been concealed, and the "parties concerned ſecured from loſs, as well to the dimi- "nution of the publick revenue, as to the great detriment "of fair traders; and by introducing a miſchievous kind of "gaming or wagering, under the pretence of aſſuring the "riſk on ſhipping, and fair trade, the inſtitution and laudable "deſign of making aſſurances hath been perverted; and "that, which was intended for the encouragement of trade "and navigation, has, in many inſtances, become hurtful of, "and deſtructive to the ſame." 19 Geo. II. c. 37.

"For remedy whereof be it enacted, that no aſſurance or "aſſurances ſhall be made by any perſon or perſons, bodies "corporate or politick, on any ſhip or ſhips belonging to "his majeſty, or any of his ſubjects, or on any goods, mer- "chandizes, or effects, laden or to be laden on board of any "ſuch ſhip or ſhips, *intereſt or no intereſt, or without further "proof of intereſt than the policy, or by way of gaming, or wager- "ing, or without benefit of ſalvage to the aſſurer*; and that every "ſuch inſurance ſhall be null and void to all intents and pur- "poſes." Sect. 1.

"Provided always, that aſſurance on private ſhips of war, "fitted out by any of his majeſty's ſubjects ſolely to cruize "againſt his majeſty's enemies, may be made by or for the "owners thereof, intereſt or no intereſt, free of average and Sect. 2.

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" without benefit of ſalvage to the aſſurer; any thing herein " contained to the contrary thereof in any wiſe notwithſtand- " ing."

Sect. 3. " Provided alſo, that any merchandizes or effects from any " ports or places in *Europe*, or *America*, in the poſſeſſion of the " crowns of *Spain* or *Portugal*, may be aſſured in ſuch way " and manner, as if this act had not been made."

Sect. 4. The fourth ſection relates to re-inſurances, which will be the ſubject of the following chapter.

Sect. 5. " And be it enacted, that all and every ſum and ſums of " money to be lent on bottomry, or at *reſpondentia*, upon any " ſhip or ſhips belonging to any of his majeſty's ſubjects, bound
[264] " to or from the *Eaſt Indies*, ſhall be lent only on the ſhip, or " on the merchandize or effects laden, or to be laden, on board " of ſuch ſhip, and ſhall be ſo expreſſed in the condition of the " ſaid bond: and the benefit of ſalvage ſhall be allowed to the " lender, his agents or aſſigns, *who alone ſhall have a right to* " *make aſſurance on the money ſo lent*: and no borrower of money " on bottomry or *reſpondentia*, as aforeſaid, ſhall recover more " on any aſſurance than the value of his intereſt in the ſhip, or " in the merchandizes or effects laden on board of ſuch ſhip, " excluſive of the money ſo borrowed; and in caſe it ſhall " appear, that the value of his ſhare in the ſhip, or in the mer- " chandizes or effects laden on board, doth not amount to the " full ſum or ſums he hath borrowed as aforeſaid, ſuch borrower " ſhall be reſponſible to the lender for ſo much of the money " borrowed, as he hath not laid out on the ſhip or merchan- " dize laden thereon, with lawful intereſt for the ſame, together " with the aſſurance, and all other charges thereon, in the pro- " portion the money not laid out ſhall bear to the whole " money lent, notwithſtanding the ſhip and merchandizes be " totally loſt."

Upon this laſt ſection, of which we ſhall treat more fully in the chapter on Bottomry, it may be ſufficient in this place to obſerve, that none but the lender ſhall have a right to make in-

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ſurance on the money lent. It is alſo to be remarked, that this regulation of inſurance on bottomry or *reſpondentia* intereſt, extends only to *Eaſt India* ſhips: and therefore, an inſurance of a *reſpondentia* intereſt upon any other ſhips may be made in the ſame manner as they uſed to be before this act. It has alſo been decided upon this clauſe of the act, that it never meant or intended to make any alteration in the manner of inſurances: and it was declared by the whole court in the caſe of *Glover* v. *Black*, which was fully reported in a former chapter, to be the eſtabliſhed law and uſage of merchants, that *reſpondentia* and bottomry muſt be mentioned and ſpecified in the policy of inſurance.

Glover v. Black, 3 Burr. 1394. Vide ante, c. 1. P. 10.

By the firſt ſection of the act it is clear that at this day all inſurances made contrary to it are abſolutely void and of no effect; which, as has already been ſhewn, was alſo the caſe by the ancient law of this country. It may now be material to conſider firſt, what caſes have, by the conſtruction put by the learned judges upon this ſtatute, been held not to fall within its deſcription: and ſecondly, thoſe which do, and in which, the policies have conſequently been holden to be void.

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It was formerly a matter of doubt, whether the act was meant to extend to inſurances of foreign property, and on foreign ſhips. The better opinion, however, was, that it did not; for it was clear, that ſuch inſurances did not fall within the words of the ſtatute; and from an attentive conſideration of the preamble, they do not ſeem to come under the deſcription of the miſchiefs, againſt which it was the intention of the legiſlature to provide. But theſe doubts are entirely at an end by ſeveral deciſions of the courts; and particularly by a caſe, in which it was expreſsly declared by the court, (and the reaſon for it ſtated), that the act was not deſigned to extend to foreign ſhips.

The caſe was this: the policy was on goods, on board three *French* veſſels, from *St. Domingo* to *Bourdeaux*. The material part of it, as to this caſe, was in the following words: "On "all goods loaden or to be loaden on board the ſhips *Le Soigneux*,

Thelluſſon v. Fletcher, Doug. 315.

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" *La Pucelle, Le Vainquer*, all or any of them. The ſaid goods " and merchandizes by agreement are, and ſhall be valued at " (*a*) on 25 caſks of clayed ſugar, and 12 " hogſheads of muſcavadoes: *the policy to be deemed ſufficient* " *proof of intereſt, in caſe of loſs.*" The firſt count in the declaration ſtated, that goods to a great amount, being the property of certain foreigners, had been ſhipped on board *Le Soigneux*, and that ſhe had been loſt. The ſecond averred, that the goods were ſhipped on board *the three ſhips, or ſome or one of them*, to the amount of the ſum inſured; and that two of them had been captured, and the other loſt.

This caſe came before the court upon a motion to ſet aſide the writ of enquiry, which had been executed before the ſheriff, after a judgment by default, on this ground: that the jury had aſſeſſed the damages to the amount of the defendant's ſubſcription, without any proof of the amount or value, or any evidence whatever, except that of the defendant's handwriting to the policy. In addition to this objection, an affidavit was produced, tending to ſhew, that in fact the inſured had no intereſt. It was argued for the defendant, that by the expreſs agreement of the parties, no other proof of intereſt but the policy was required; and this inſurance on foreign ſhips and property was not within the ſtatute prohibiting ſuch policies; ſo that the plaintiff was entitled to recover the ſum inſured by the defendant, even if it could be proved that the inſured had no property on board. The court ſaid that this was not a policy within the ſtatute, foreign ſhips not having been included in that act, on account of the difficulty of bringing witneſſes from abroad to prove the intereſt. The only difficulty there could have been here, was from the circumſtance of there having been three ſhips; but the ſecond count was ſo framed, as to make the caſe the ſame, as if there had been but one. By ſuffering judgment to go by default, the defendant has confeſſed the plaintiff's title to recover; and the amount was fixed by the ſtipulation in the policy.

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In a ſtill more modern caſe, which was much diſcuſſed in two arguments, one of the points was, the inſurance being on

Crauſurd v. Hunter, 8 Term R. 13. See the ſame caſe poſt, p. 272.

(*a*). This was blank, as here printed.

Dutch

Dutch prize ſhips, whether a count in the declaration, averring that the plaintiffs as commiſſioners for the diſpoſal of *Dutch* ſhips and effects made the inſurance, *and that the ſaid ſhips, or any of them, were not belonging to his majeſty, or any of his ſubjects*, was good. This point came on upon a demurrer: and after argument,

See 35 Geo. III. c. 80.

Lord *Kenyon* ſaid—"This queſtion depends on the conſtruction of the ſtatute 19 *Geo.* 2. *c.* 37. for notwithſtanding the argument, I think at common law a perſon might inſure without having any intereſt; but the preamble and enacting part of the ſtatute remove all doubt; for the act recites the miſchiefs and inconveniences that had ariſen from the making of aſſurances intereſt or no intereſt, and then it enacts (not declaring) that no ſuch aſſurance ſhall be made, except in certain caſes, which for very wiſe and politic reaſons were excepted. Therefore I am ſatisfied that this count is good, unleſs it be on an inſurance prohibited by that ſtatute. But that ſtatute only applies to ſhips belonging to his majeſty or any of his ſubjects, and does not extend to foreign ſhips. The defendant's counſel then wiſhed us to conſider theſe ſhips as belonging to the government of this country: but that cannot be, for the property in captured ſhips is not altered before condemnation in the court of Admiralty.

It was formerly thought, that a *valued* policy was a wager-policy, like intereſt or no intereſt. But this idea is now exploded, as we ſhall preſently ſhew by a ſolemn deciſion of the court of King's Bench. Of the difference between open and valued policies much has been already ſaid; and the origin of the latter was derived from this ſource, it being ſometimes troubleſome to the trader to prove the value of his intereſt, or to aſcertain the quantity of his loſs, he gave the inſurer a higher premium to agree to eſtimate his intereſt at a preciſe ſum. To recover upon this kind of policy, the inſured need only prove that he had an intereſt, without ſhewing the value. If indeed it appeared, or could be made appear, that the intereſt proved was merely a cover to a wager, in order to evade the ſtatute, there is no doubt ſuch a policy would be void.

Vide ante, c. 2.

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All this doctrine was very fully ſtated, and commented upon by Lord *Mansfield*, in giving judgment in a cauſe then depending in the court of King's Bench. "A valued policy," ſaid his Lordſhip, "is not to be conſidered as a wager-policy, or "like *intereſt or no intereſt*. If it were, it would be void by "the act of 19 *Geo.* 2. *c.* 37. The only effect of the valuation "is fixing the amount of the prime coſt; juſt as if the parties [267] "had admitted it at the trial: but in every argument, and for "every other purpoſe, it muſt be taken that the value was fixed "*in ſuch a manner*, as that the inſured meant only to have an "indemnity. If it be undervalued, the merchant himſelf "ſtands inſurer for the ſurplus. If it be *much overvalued*, it "muſt be done with a bad view; either to gain, contrary to "the 19th of the late king; or with ſome view to a fraudulent "loſs: therefore an inſured never can be allowed to plead in a "court of juſtice, that he has greatly overvalued, or that his "intereſt was a trifle only. It is ſettled, that upon valued "policies the merchant need only prove ſome intereſt, to take "it out of 19 *Geo.* 2. becauſe the adverſe party has admitted "the value: and if more were required, the agreed valuation "would ſignify nothing. But if it ſhould come out in proof, "that a man had inſured 2000*l.* and had intereſt on board to "the value of a cable only; there never has been, and I be-"lieve there never will be a determination, that by ſuch an "evaſion the act of parliament may be defeated. There are "many conveniences from allowing valued policies: but "where they are uſed merely as a cover to a wager, they "would be conſidered as an evaſion. The effect of the va-"luation is only fixing concluſively the prime coſt. If it be "an open policy, the prime coſt muſt be proved: in a valued "policy it is agreed." For theſe reaſons Lord *Mansfield* held, that a valued policy is not void by the ſtatute of the 19 *Geo.* 2.

Lewis v. Rucker, 2 Burr. 1167. Vide ante, c. 6. p. 104.

The paſſage juſt quoted at length was, in a ſubſequent caſe, referred to in the judgment of the court; and the doctrine there advanced was adopted and confirmed.

It

Grant v. Parkinſon, Michaelmas, 22 Geo. III. in B. R.

It was an action on a policy of inſurance on the ſhip *Providence*, at and from *Surinam*, or whatſoever other ports in the *Weſt Indies* at which the ſhip might load, to *Quebec*. At the trial before Lord *Mansfield*, at the ſittings after *Trinity* Term 1781, the principal queſtion on the merits was, whether the plaintiff had an inſurable intereſt. It was an inſurance on the profits expected to ariſe on a cargo of moloſſes belonging to the plaintiff, who had a contract with government to ſupply the army with ſpruce beer. Lord *Mansfield* thought it an inſurable intereſt. But the part of the caſe, which calls for our attention at preſent, was a clauſe declaring, "that in caſe "of loſs, it was agreed that the profits ſhould be valued at 1000*l.* without any other voucher than the policy." This, it was inſiſted, rendered the policy void, as well within the letter, as within the ſpirit of the 19 *Geo.* 2. *c.* 37.

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Lord *Mansfield*, at the trial, inclined to think that the contract was a fair one; but ſtill he could not get over the objection, the inſtrument being void on the face of it. His Lordſhip, however, ſaved the point for the opinion of the court, a verdict being entered for the plaintiff, ſubject to that reference.

In *Michaelmas* Term following, the matter came on to be heard; when, after full argument at the bar,

Lord *Mansfield*, C. J. ſaid: "I have, ſince the ſittings at "*Guildhall*, on further conſideration, changed my opinion. I "then thought the preſent policy within the act of parliament: "I now think otherwiſe. On the conſtruction of the act, it "has uniformly been held, that a valued policy is not void. It "is incumbent on the plaintiff to prove ſome intereſt; but it is "not neceſſary to go into the whole value. In the caſe of "*Lewis* v. *Rucker*, this doctrine was much conſidered."—[Here his Lordſhip read the words already reported, and then he proceeds thus] "This inſurance is on the profits of a cargo, "belonging to a man, having a contract to ſupply the army, "and if it arrive, the profits are pretty certain. The mean-"ing of the policy is not to evade the act of parliament, but

"to

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"to avoid the difficulty of going into an exact account of "the quantum. I cannot diſtinguiſh it from a valued policy; "there is no pretence for ſaying it is a *wagering* one." The other judges concurred; and the *poſtea* was given to the plaintiff (*a*).

Da Coſta v. Firth, 4 Burr. 1966.

In another caſe alſo it appeared, that an inſurance had been made upon any of the packet-boats that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England* as his majeſty ſhould direct, for one year, from *October* 1763, to *October* 1764, upon any kinds of goods and merchandizes whatſoever. And it was agreed, that the goods and merchandizes *ſhould be valued at the ſum inſured* on ſuch packet-boat, *without farther proof of intereſt than the policy*; and to make no return of premium for want of intereſt being on bullion or goods. The inſured had an intereſt in bullion on board the *Hanover* packet, being one of the king's packets between *Liſbon* and *Falmouth*: and it was totally loſt within the time mentioned in the policy.

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Vide ante, p. 118. 164.

This caſe has already been quoted for another purpoſe: but on this point, the court held, that this was a policy of a peculiar ſort; and was an exception out of the ſtatute of 19 *Geo.* 2. *c.* 37. It is a mixed policy; partly a wager-policy, partly an open one: and it is a valued policy, and fairly ſo, without fraud or miſrepreſentation. Therefore the loſs having happened, the inſured is entitled as for a total loſs.

It has alſo been ſolemnly ſettled, that upon a joint capture by the army and navy, the officers and crews of the ſhips, before condemnation, have an inſurable intereſt, by virtue of the prize act, which uſually paſſes at the commencement of a war.

Le Cras v. Hughes, B. R. Eaſt. 22 Geo. 3.

This was ſo held in an action upon a policy of inſurance on the ſhip *St. Domingo*, at and from *Omoa* to *London*; upon

Flint v. Le Meſurier, Sittings after Hilary Term 1796, at Guildhall.

(*a*) In a very late caſe where the intereſt was declared by the policy to be "on *the commiſſions of the plaintiff as conſignee of the cargo, valued at* 1500*l.*" Lord *Kenyon* expreſſed a very ſtrong opinion, that this was a good inſurable intereſt: but the matter being compromiſed, it did not come to any deciſion.

which

which a caſe was reſerved for the opinion of the court. The facts of the caſe were theſe: Captain *Luttrell*, commanding five of his majeſty's ſhips, and Captain *Dalrymple*, commanding a party of the land forces, captured two *Spaniſh* regiſter ſhips, lying under the protection of Fort *Omoa*: that the ſhip *St. Domingo* (on which the inſurance was made) was one of the prizes, and was coming home laden with the property then captured; upon which ſhip the defendant underwrote 500*l.*: and that the ſhip was loſt by perils of the ſea. The queſtion was, whether, by virtue of the prize act of the 19 *Geo.* 3. *c.* 67. the officers and crew of the ſhips under captain *Luttrell* had ſuch an inſurable intereſt in the *St. Domingo*, as to entitle them to recover?

Lord *Mansfield*.—"There are two queſtions in this cauſe: 1ſt, Whether the ſea officers had an inſurable intereſt? This will depend on the prize act and proclamation. 2dly, Whether poſſeſſion would entitle them to inſure, upon the bare contingency of a future grant from the crown? As to the firſt, conſider the act of parliament, which gives to all the people on board, that is, to the flag officers, commanders, and other officers; to the ſeamen, marines, and ſoldiers on board every ſhip and veſſel of war, the ſole intereſt and property of and in [270] all and every ſhip and veſſel, goods, and merchandizes, which they ſhall take during the war, after condemnation. Does the act ſay, that the ſeamen only ſhall take? does it leave a joint capture by the army and navy undefined? Certainly not. Suppoſe, for inſtance, a caſe which I remember to have happened: a *Dutch* and *Engliſh* fleet combined captured ſome ſhips; the *Engliſh* ſailors could not take ſolely; nor could the act mean that they ſhould have nothing. In the caſe in queſtion, ſuppoſe captain *Dalrymple* had given no aſſiſtance, is there any doubt that captain *Luttrell* would have taken the whole? The only difference is, that now he has not the merit of a ſole capture. The word "*ſoldiers*" in the proclamation, means ſoldiers on board the ſhip. Thus it ſtands on the act and proclamation. But ſuppoſing that doubtful, as far back as queen *Anne*'s time down to the preſent, wherever a capture has been made by a king's ſhip or a privateer, the crown has always given

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given a grant of it after condemnation. There is no inſtance to the contrary. Have not then the inſured ſuch an intereſt in the ſhip coming home, as to entitle them to an indemnity? Suppoſe a man is made agent of prizes; he has not the poſſeſſion of the property, and yet he has ſuch an intereſt in any ſhip coming home, that he may inſure. Here the inſured have the poſſeſſion, and a certain expectation of receiving the property captured for their own emolument from the crown."

Judgment for the plaintiff.

Boehm v. Bell, 8 Term Rep. 154.

So in a more modern caſe it has been held that the captors of ſhips ſeized by them as prize have an inſurable intereſt in them, in the voyage home for the purpoſe of bringing them to adjudication in the Admiralty; ſo that although the court of Admiralty ſhould ultimately adjudge them to be no prize, and award reſtitution to the original owners, the captors are not entitled to a return of premium. The point came before the court upon a caſe reſerved at the trial.

Lord *Kenyon*, after argument, obſerved, "that if it were a legal capture, the captors were entitled; if the capture were improperly made, they were liable to be called to account in the court of Admiralty, where they might be amerced in damages and coſts. They had therefore a right to inſure themſelves againſt the deciſion, that might have loaded them with damages and coſts. On this ſhort ground I am of opinion that the aſſured had an inſurable intereſt, that the riſk was begun, and that there can be no return of premium."

Mr. Juſtice *Groſe*.—"The whole difficulty has ariſen from confounding an abſolute indefeaſible intereſt with an inſurable intereſt. It is not pretended that the aſſured had the abſolute property in the ſubject of inſurance; neither need they have ſuch property to make the policy legal; it is ſufficient, if they had an inſurable intereſt; and, according to what was ſaid by Lord *Mansfield* in *Le Cras* v. *Hughes* they certainly had an inſurable intereſt. If they had ſucceeded

ceeded in the court of Admiralty, it will be admitted that they had an insurable interest; and in case of their not succeeding there, there were events in which they might be made answerable, and against which it was competent to them to insure."

Mr. Justice *Lawrence*.—"The case turns on this short question, whether or not the assured had an interest which they might insure? Did they mean to game? or was there not a loss against which they might indemnify themselves by a policy? I do not mean a certain but a possible loss. Now it has been shewn that this was a case in which the Admiralty might have decreed costs and damages, and that is sufficient. It might be asked in the language of Lord *Mansfield* in *Le Cras* v. *Hughes*, had not the insured such an interest in the ship coming home, as to entitle them to an indemnity? I think they had, and therefore the plaintiffs are not entitled to a return of premium."

So also, the Commissioners appointed by the act of the 35 *Geo.* 3. *c.* 80. for the purpose of taking care and disposing of *Dutch* ships and effects detained in or brought into the ports of this kingdom, and who by their commission are to manage, sell, and dispose of the same to the best advantage, according to the instructions they should from time to time receive from his majesty and the privy council, *have an insurable interest in Dutch* ships and effects seized at sea by his majesty's ships of war, that they might be brought into the ports of this kingdom; they may insure in their own name, and a count in a declaration on such a policy, stating the nature of their trust, and averring that they *as such commissioners* were *interested* in the said ships and goods, and that the said insurance was made to and for their use, benefit, and account, as such commissioners, was, upon demurrer, holden to be good, the court considering them in the light of trustees, consignees, or agents, in either of which characters it was conceived they had an insurable interest.

Craufurd v. Hunter, 8 Term Rep. 13. See ante, p. 266. for another point.

In a late case in the court of Common Pleas, where a house in *Spain*, who were indebted to the plaintiffs, had consigned

Hill and another v. Secretan, 1 Bos. and Puller, 315.

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ſigned goods to Meſſrs. *Dubois*, and indorſed the bill of lading to them, with a letter annexed, directing them to hold apart of the ſaid cargo for the uſe of the plaintiffs, who upon getting ſuch intelligence made the inſurance in queſtion, although they had given no orders for the goods, the court held that the plaintiffs, being creditors of the houſe in *Spain*, raiſed a good conſideration for the aſſignment; and that therefore there could be no doubt that the plaintiffs had a good inſurable intereſt.

See Anderſon v. Edie, poſt 432.

Wolfe and another v. Horncaſtle, 1 Boſ. and Pull. 316.

So alſo in the ſame court, it was held that where a man had conſigned a cargo to the Cudbear Company in *London*, and drawn bills for the amount, but tranſmitted the bills of lading through the plaintiffs, his general agents, to be ſent to the Cudbear Company that they might inſure, and he at the ſame time drew on plaintiffs for 300 *l.* which was accepted and paid: but the Cudbear Company refuſed to accept the bills drawn on them, or take to the cargo, or to inſure, upon which the plaintiffs made inſurance in their own name, and informed the conſignor, who approved thereof; the plaintiffs were to be conſidered as conſignees of the whole, and had a right in that character to inſure for the benefit of their conſignor; and that they had a clear inſurable intereſt in themſelves to the amount of 300 *l.*

But ſtill in the conſtruction of the act it has always been holden, that all inſurances made by perſons having no intereſt in the event, about which they inſure, or without reference to any property on board, are merely wagers, deſtructive of the true ends for which this contract was introduced into the mercantile world; and therefore are to be conſidered as abſolutely null and void.

Kent v. Bird, Cowp. 583.

Upon a motion for a new trial, Lord *Mansfield*, who had tried the cauſe, made the following report: This was an action brought by the plaintiff, who was a ſurgeon on board an *Eaſt Indiaman*, againſt the defendant, a paſſenger in the ſame ſhip, to recover a ſum of 1000 *l.* upon a ſpecial agreement, bearing date the 18th of *July* 1774; by which, after reciting, that "whereas the plaintiff had agreed to pay to the defendant the

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" ſum of 20 *l.* ſterling at the next port the ſhip ſhould arrive at, " it was witneſſed that he the defendant, in conſideration " thereof, did undertake that the ſaid ſhip ſhould ſave her paſ- " ſage to *China* that ſeaſon: and in caſe ſhe did not, that then " he would pay to the plaintiff the ſum of 1000 *l.* at the end of " one month after the arrival of the ſaid ſhip in the river " *Thames.*" At the trial it appeared, that the plaintiff duly paid the amount of the 20 *l.* to the defendant at the next port, in pagodas: that the veſſel being delayed below the Cape and *Madras* in conſequence of a miſcalculation of five days in the reckoning, and the monſoons ſetting in earlier than uſual, ſhe loſt her paſſage. That the plaintiff had *ſome goods* on board, which were liable to ſuffer by the loſs of the ſeaſon; and that whilſt it was ſtill doubtful whether the ſhip would or would not ſave her paſſage, the captain had applied to each of the parties, to perſuade them to reſcind the agreement; repreſenting that the ſum to be paid in either event would be more than the loſer could afford. That the plaintiff was willing to have cancelled the agreement; but the defendant poſitively refuſed. The jury found a verdict for the plaintiff, damages 980 *l.* but I gave the defendant leave to move for a new trial upon the queſtion, whether this were not an agreement within the ſtatute 19 *Geo.* 2. *c.* 37. and therefore void.

After this caſe had been fully argued at the bar,

Lord *Mansfield* ſaid: " A policy of inſurance is, in the na- ture of it, a contract of indemnity, and of great benefit to trade. But the uſe of it was perverted by its being turned into a wager. To remedy this evil, the ſtatute of the 19 *Geo.* 2. *c.* 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perverſion of this ſpecies of contract; and amongſt others, that of gaming or wagering under pretence of inſuring veſſels, *&c.* proceeds, under general words, to prohibit *all* contracts of inſurance by way of *gaming* or *wagering*. Here, the plaintiff gives ſo much to the defendant in conſideration that the ſhip ſhould ſave her paſſage to *China*; and if not, then, upon her returning ſafe to *England*, he is to receive 1000 *l.* If the firſt of theſe events happened, the defendant won; but he could not loſe, unleſs

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both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no intereſt in the caſe, it is gaming and wagering. Therefore there muſt be a new trial."

From this caſe we find, that the principle ſtated by Lord *Mansfield* in *Lewis* v. *Rucker* is confirmed: namely, that where a man inſures 2000 *l.* and it turns out in proof that he has an intereſt to the value of a cable only, ſuch an intereſt will never be allowed to operate ſo as to evade the ſtatute. For in this caſe, it appeared in evidence, that the plaintiff had *ſome goods* on board; but that was held not to be an intereſt ſufficient to juſtify an inſurance ſo evidently contrary to the act of parliament.

Indeed wherever the court can ſee upon the face of the policy, that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare ſuch policy void.

Lowry and another v. Bourdieu, Doug. 468.

The plaintiffs had lent to *Lawſon*, captain of the *Lord Holland Eaſt Indiaman*, 25,000 *l.* for which he had given them a common bond, in the penal ſum of 52,000 *l.* While he was with his ſhip at *China*, the plaintiffs got a policy of inſurance underwritten by the defendant and others, which was in the following terms: "at and from *China* to *London*, beginning the "adventure upon the goods from the loading thereof on board "the ſaid ſhip at *Canton*, in *China*, &c. and *upon the ſaid ſhip* "from and immediately following her arrival at *Canton* in "*China*, valued at 26,000 *l.* being the amount of captain *Pa*"*trick Lawſon*'s common bond, payable to the parties, as ſhall "be deſcribed at the back of this policy; and it bears date the "16th day of *December* 1775; and in caſe of loſs, *no other* "*proof of intereſt to be required than the exhibition of the ſaid* "*bond*: warranted free from average, and without benefit of "ſalvage to the inſurer."

At the head of the ſubſcription was written, "*On a bond as above expreſſed.*" Captain *Lawſon* ſailed from *China*, and arrived

lived ſafe with his privilege (as it is called) or adventure, in *London*, on the 1ſt of *July* 1777, none of the events inſured againſt having happened. The receipt of the premium was acknowledged on the back of the policy. This caſe came before the court upon an action for a return of premium, on the ground that, the policy being without intereſt, the contract was void. This caſe, as far as it relates to the queſtion of return of premium, will be conſidered in a future chapter; but in the courſe of the diſcuſſion, it became neceſſary to determine, whether the policy, juſt recited, was good within the ſtatute. At the trial which came on at the ſittings after *Trinity* term, 1780, the Chief Juſtice was of opinion, that this was a gaming policy prohibited by the ſtatute of 19 *Geo.* 2. *c.* 37. and a verdict was given for the defendant. His lordſhip, however, having expreſſed a doubt upon the propriety of his opinion on other points of the cauſe, a motion for a new trial was afterwards made, and all the queſtions came to be debated before the court: when the majority of the judges confirmed Lord *Mansfield's* firſt direction upon all the points. It is true Mr. Juſtice *Willes* differed from his brethren upon that occaſion; the learned judge being of opinion, upon the queſtion relating to our preſent enquiry, that this was not a gaming policy: that it did not appear to him, that the parties had any idea they were entering into an illegal contract: that the whole was diſcloſed, and they *thought* there was an intereſt; this was a miſtake; but it is a new point of law.

The three other judges ſupported their opinions upon the following grounds.

Lord *Mansfield*.—"It is certainly true, in many inſtances, that firſt thoughts are beſt. I am now very much inclined to my firſt opinion. There are two ſorts of policies of inſurance; mercantile and gaming policies. The firſt ſort are contracts of indemnity, and of indemnity only; and from that principle a great variety of deciſions and conſequences have followed. The ſecond ſort may be the ſame in form; but in them there is no contract of indemnity, becauſe there is no intereſt upon which a loſs can accrue. They are mere games of hazard, like the caſt of a die. In the preſent caſe, the nature of the

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inſurance is known to both parties. The plaintiffs ſay, "We "mean to game: but we give our reaſon for it; Captain "*Lawſon* owes us a ſum of money, and we want to be ſecure "in caſe he ſhould not be in a ſituation to pay us." It was a hedge. But they had no intereſt; for if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiffs would have been entitled to recover the amount of the bond from *Lawſon*. This then is a gaming policy; and againſt an act of parliament."

Mr. Juſtice *Aſhhurſt*.—"A policy of inſurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice, which ſhews deciſively that this was a gaming policy."

Mr. Juſtice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any miſtake in matter of fact. If the *law* was miſtaken, the rule applies, that *ignorantia juris non excuſat*. This was a mere gaming policy without intereſt." Agreeably to this opinion, the rule for a new trial was diſcharged.

The ſecond ſection of the act in queſtion, which allows of inſurances being made on private ſhips of war, intereſt or no intereſt, ſeems ſufficiently clear, and requires no explanation.

The third ſection, by which inſurances upon any merchandizes or effects from any ports or places in *Europe* or *America*, in the poſſeſſion of the crowns of *Spain* or *Portugal* may be effected in the manner practiſed before this act was paſſed, ſeems to be obſcurely worded. The learned commentator upon the law of *England* obſerves, that the reaſon of this proviſo is ſufficiently obvious. Notwithſtanding this authority, in order to comprehend the meaning of the legiſlature, we muſt obſerve, that the trade from *Spain* and *Portugal*, to their reſpective colonies and eſtabliſhments in *South America*, and the returns thereof, can only be carried on by their own ſubjects; and all other perſons are prohibited from that trade by poſitive regulations of theſe reſpective ſtates. The conſequence of ſuch a prohibition is, that all the goods and merchandizes which

Mr. Juſtice Blackſtone, 2 Vol. Com. 460.

which the ſubjects of this and other countries export from *Spain* and *Portugal*, muſt be in the names of *Spaniſh* ſubjects. So that it was abſolutely neceſſary to make this exception (for no other proof but the policy itſelf can be brought); otherwiſe all inſurances upon that branch of trade muſt have been entirely void. The words, however, ſeem to allow a greater latitude than was meant by the legiſlature in making ſuch a proviſion, for by adverting merely to the words, inſurances from any ports or places in *Europe* or *America*, belonging to *Spain* and *Portugal*, to *England* or other ports of *Europe* may be made, as if this act had never paſſed. Whereas by attending to the prohibition of trade juſt mentioned to any but the ſubjects of *Spain* and *Portugal*, as the commerce betweeen theſe colonies and the parent countries can only be carried on by ſubjects, it is evident that the legiſlature intended rather to have ſaid, that inſurances on goods from ports belonging to *Spain* and *Portugal* in *Europe* to any ports in *America* belonging to thoſe courts; and from ſuch ports in *America* to ſuch ports or places in *Europe*, ſhall be valid and effectual contracts, than to authorize inſurances from the dominions of *Spain* and *Portugal* in *Europe* or *America*, to whatſoever place in the world the ſhip, in which theſe goods are to be carried, may happen to be deſtined. The words, however, certainly admit of that broad conſtruction; for the place of deſtination is not aſcertained.

Upon this ſection of the act, it may be obſerved, that the equitable conſtruction of ſuch contracts of inſurance as are protected by it, ſeems to be, that they may be made without intereſt, notwithſtanding the caſe of *Goddard* v. *Garrett*, above cited: ſince in ſuch inſtances it is impoſſible for the perſon inſured to bring any certain proof of intereſt on board.

V. ante, p. 260.

Hitherto we have ſpoken merely of that part of this very ſalutary act, which requires, that every perſon making ſuch a contract, ſhould have an intereſt in that, which is the object of the inſurance. Another part of it ſtill claims our attention, that which prohibits re-aſſurances. What a re-aſſurance is; in what caſes it is prohibited; and when it is allowable, will form the ſubject of the following chapter.

CHAPTER THE FIFTEENTH.

Of Re-Aſſurance, and Double Inſurance.

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RE-ASSURANCE, as underſtood by the law of *England*, may be ſaid to be a contract, which the firſt inſurer enters into, in order to relieve himſelf from thoſe riſks which he has incautiouſly undertaken, by throwing them upon other underwriters, who are called re-aſſurers. This ſpecies of contract has obtained a place in moſt of the commercial ſyſtems of the trading powers of *Europe*; and it is allowed by them at this day to be politic and legal. The learned *Roccus* has decided expreſsly in favour of it; and has cited many reſpectable authorities in ſupport of his opinion. "Aſſecurator, poſt "factam aſſecurationem, poteſt ſe aſſecurari facere ab alio "aſſecuratore, et iſte ſecundus aſſecurator tenetur pro aſſecu- "ratione factâ a primo, et ad ſolvendum omne totum, quod "primus aſſecurator ſolverit, et iſta ſecunda aſſecuratio valet."

Roccus de Aſſecur. Not. 12.

By the ancient law of *France* ſuch aſſurances were reckoned valid, and perfectly conſiſtent with equity and good conſcience. The author of the Guidon obſerves, that if it ſo happen that the inſurers, after underwriting the policy, repent of their engagement, or are afraid to encounter the riſk, they are at liberty to re-inſure; but ſtill they cannot prevent the inſured from making his demand upon them in caſe of loſs, for having, by their ſignature, promiſed indemnity, they cannot, by any proteſtations to the contrary, diſcharge themſelves from their reſponſibility, without the conſent of the inſured. *Lewis* the Fourteenth, when, by the aſſiſtance of the famous *Colbert*, he promulgated thoſe ordinances, which will be a laſting honour to the *French* nation, adopted the idea that prevailed when the Guidon was written: for by an article in that celebrated code of laws, he expreſsly declared, "that it ſhould be lawful to "the inſurers to make re-aſſurance with other men of thoſe "effects, which they had themſelves previouſly inſured." It is not in *France* alone that this law prevails; for by the poſi-

Le Guidon, c. 2. art. 19.

Ord. Lewis 14. tit. Aſſur. art. 20.

2 Mag. 190. 333. 419.

tive

tive and expreſs regulations and ordinances of *Koningſberg*, *Hamburgh*, and *Bilboa*, re-aſſurances are allowed to be effected, and conſequently are lawful contracts.

By the paſſage cited from the Guidon it might be obſerved, that it was a diſtinguiſhing character of this ſpecies of contract, that notwithſtanding a re-inſurance, the firſt contract ſubſiſts as at firſt, without change or amendment. The re-inſurer is wholly unconnected with the original owner of the property inſured; and as there was no obligation between them originally, ſo none is raiſed by the ſubſequent act of the firſt underwriter. The riſks of the inſurer form the object of the re-inſurance, which is a new independant contract, not at all concerning the inſured; who conſequently can exerciſe no power or authority with reſpect to it.

1 Emerigon, p. 247.

Pothiér, tit. Aſſurance, No. 96.

Agreeably to the laws of thoſe countries juſt referred to, and conſiſtently with the opinions of thoſe reſpectable writers, whoſe works we have had ſuch frequent occaſion to mention, the law of *England* adopted their regulations, and permitted the underwriters upon policies to inſure themſelves againſt thoſe riſks for which they had inadvertently engaged to indemnify the inſured; or where perhaps they had involved themſelves to a greater amount, than their ability would enable them to diſcharge. Although ſuch a contract ſeems perfectly fair and reaſonable in itſelf, and might be productive of very beneficial conſequences to thoſe concerned in this important branch of trade; yet, like many other uſeful inſtitutions, it was ſo much abuſed, and turned to purpoſes ſo pernicious to a commercial nation, and ſo deſtructive of thoſe very benefits it was originally intended to promote and encourage, that the legiſlature was at laſt obliged to interpoſe, and by a poſitive law to cut off all opportunity of practiſing thoſe frauds in future, which were become thus glaring and enormous.

Accordingly by the fourth ſection of that ſtatute, which formed the ſubject of the preceding chapter, it was enacted, "that it ſhould not be lawful to make RE-ASSURANCE, unleſs "the aſſurer ſhould be inſolvent, become a bankrupt, or die;

19 Geo. II. c. 37. ſ. 4.

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" in either of which caſes, ſuch aſſurer, his executors, ad-
" miniſtrators, or aſſigns, might make re-aſſurance, to the
" amount before by him aſſured, provided it ſhould be ex-
" preſſed in the policy to be a re-aſſurance."

From this act it is apparent, that all kinds of re-aſſurance are not prohibited; but wherever ſuch a contract tends to the advancement of commerce, or to the real benefit of an individual, in ſuch a caſe it ſhall be permitted. Thus in caſe of inſolvency or bankruptcy, it is advantageous to the creditors in general, as well as to the individual, that a re-aſſurance ſhould be made: for by theſe means the fund of the bankrupt's eſtate is not diminiſhed in caſe of loſs, and the inſured has a better ſecurity for the payment of the amount of his damage, or at leaſt a proportion of it (*a*). If the inſurer die, it is no

(*a*) Formerly, if an underwriter became a bankrupt after he had ſubſcribed the policy, and before a loſs happened, the inſured was not entitled to a dividend out of the bankrupt's eſtate. This being found a heavy inconvenience, and a diſcouragement to trade, parliament was obliged to interpoſe, and to alter the law in this reſpect. The ſtatute recited, " that merchants and traders frequently lend money
19 Geo. II. c. 32. ſ. 2. " on bottomry, or at *reſpondentia*, and in the courſe of their trade, frequently cauſe
" their ſhips or veſſels, and the goods and merchandizes loaded thereon, to be in-
" ſured; and that where commiſſions of bankruptcy have iſſued againſt the obligor
" in ſuch bottomry or *reſpondentia* bond, or the underwriter, or aſſurer in ſuch in-
" ſurance, before the loſs of the ſhip or goods, in ſuch bond or policy of inſurance
" mentioned, had happened, it had been made a queſtion, whether the obligee or
" obligees in ſuch bond, or the aſſured in ſuch policy of inſurance, ſhould be let
" in to prove their debts, or be admitted to have any benefit or dividend under
" ſuch commiſſion, which might be a diſcouragement to trade." It was therefore enacted, " that the obligee in any bottomry, or *reſpondentia* bond, and the aſſured
" in any policy of inſurance, made and entered into, upon a good and valuable
" conſideration, *bona fide*, ſhould be admitted to claim; and after the loſs or con-
" tingency ſhould have happened, to prove his, her, or their debt and demands,
" in reſpect of ſuch bond or policy of inſurance, in like manner as if the loſs or
" contingency had happened before the time of the iſſuing of ſuch commiſſion of
" bankruptcy againſt ſuch obligor or inſurer; and ſhould be entitled unto, and
" ſhould have and receive, a proportionable part, ſhare, and dividend of ſuch
" bankrupt's eſtate in proportion to the other creditors of ſuch bankrupt, in like
" manner, as if ſuch loſs or contingency had happened before ſuch commiſſion
" iſſued: and that all and every perſon and perſons, againſt whom any commiſſion
" of bankruptcy ſhould be awarded, ſhould be diſcharged of and from the debt or
" debts, owing by him, her, or them, on every ſuch bond and policy of inſurance
" as aforeſaid, and ſhould have the benefit of the ſeveral ſtatutes now in force
" againſt bankrupts in like manner, to all intents and purpoſes, as if ſuch loſs or
" contingency had happened, and the money due in reſpect thereof had become
" payable, before the time of the iſſuing out the commiſſion."

loſs

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leſs neceſſary and beneficial to his ſucceſſors, that there ſhould be a re-aſſurance, than it was in the former caſe of a bankruptcy: becauſe it will provide aſſets to ſatisfy the inſured in caſe a loſs ſhould happen, and thus ſecure the eſtate of the deceaſed for the benefit of his heirs. Indeed, in both caſes, the intention of the legiſlature ſeems to have been, to provide a fund for the payment of that proportion, which, in caſe of an inſolvency, the inſured will have a right to demand, in common with the other creditors; and for the payment of the whole, without prejudice to the heir, even in caſes where the anceſtor, at the time of his death, was in ſolvent circumſtances.

This act is worded in ſuch expreſs terms, excluding every ſpecies of re-aſſurance, except in the three inſtances of death, bankruptcy, or inſolvency, that a doubt, as it ſhould ſeem, could hardly be founded upon it. But as it was held, that the firſt clauſe of the ſtatute, prohibiting inſurances, *intereſt or no intereſt*, did not extend to foreign ſhips; ſo it was argued, that re-aſſurances made here on *the ſhips of foreigners* did not fall within the act. It might have occurred, however, that the firſt clauſe of the ſtatute is qualified, and only prohibits ſuch inſurances when made *on his majeſty's ſhips, or the ſhips belonging to his majeſty's ſubjects:* whereas the clauſe in queſtion is general and without reſtriction; the inference from which is, that the legiſlature had both objects in view, and meant wholly to prohibit the one, but not the other. Vide ante, c. 14.

This point came on to be conſidered by the court of King's Bench, in the year 1787, in the form of a ſpecial caſe, ſtating, that a re aſſurance was made by the defendant on *a French veſſel*, firſt inſured by a *French underwriter* at *Marſeilles*, who was living, and who, at the time of ſubſcribing the ſecond policy, was ſolvent. Andree v. Fletcher, 2 Term. Rep. 161.

The court (*Aſhhurſt*, *Buller*, and *Groſe*, juſtices) were unanimouſly of opinion, that this policy of re-aſſurance was void: and that every re-aſſurance in this country, either by *Britiſh* ſubjects or foreigners, on *Britiſh* or foreign ſhips, is void by the

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the ſtatute; *unleſs the firſt aſſurer be inſolvent, become a bankrupt, or die.*

Le Guidon, c. 2. art. 20.

There is another ſpecies of re-aſſurance allowed by the laws of *France*, as eſtabliſhed by an ordinance of *Lewis* the Fourteenth, which was alſo taken from that ancient and excellent *French* treatiſe, that has been ſo frequently mentioned. By this regulation, it is declared lawful for the aſſured to inſure the ſolvency of the underwriter. By theſe means, the perſon inſured gets rid of thoſe fears, which he may have conceived concerning the ability of the inſurers to pay, and he gains a ſecond ſecurity to anſwer for the ſufficiency of the firſt. But it is not to *France* alone that this kind of contract is reſtrained; for by the poſitive laws of many other maritime ſtates, ſuch re-aſſurances are valid and binding contracts. The *Engliſh* ſtatute, which has been the ſubject of this and the preceding chapter, takes no expreſs notice of this ſort of inſurance; becauſe, in truth, I believe, it never was very much in practice in *England*; but, however, it ſeems clear, that ſuch a circumſtance, as the ſolvency of the underwriter, is not an inſurable intereſt; that a policy opened upon ſuch an event would be treated as a wager-policy; and would conſequently fall within the ſtatute of *George* the Second, which declares all policies made by way of gaming or wagering, to be abſolutely null and void to all intents and purpoſes.

Ord. of Lewis 14. tit. Aſſu. art. 20.

2 Mag. 190. 419.

Double Inſurance.

Having ſaid thus much of re-aſſurances, I ſhall proceed to conſider the nature of a double inſurance, and to ſtate the few caſes that have been determined upon the ſubject. I treat of it in this place, becauſe theſe two kinds of inſurance have been ſometimes confounded together, and ſuppoſed to mean the ſame thing: whereas no two ideas can be more diſtinct. We have already ſeen what is meant by a re-aſſurance. A double inſurance is where the ſame man is to receive two ſums inſtead of one, or the ſame ſum twice over, for the ſame loſs, by reaſon of his having made two inſurances upon the ſame goods or the ſame ſhip. The firſt diſtinction between theſe two contracts is, that a re-aſſurance is a contract made by the firſt underwriter, his executors or aſſigns, to ſecure himſelf, or his eſtate: a

1 Burr. 496.

double

double inſurance is entered into by the inſured. A re-aſſurance, except in the caſes provided for by the ſtatute, is abſolutely void: a double inſurance is not void; but ſtill the inſured ſhall recover only one ſatisfaction for his loſs. This requires explanation. Where a man has made a double inſurance, he may recover his loſs, againſt which of the underwriters he pleaſes, but he can recover for no more than the amount of his loſs. This depends upon the nature of an inſurance, and the great principles of juſtice and good faith. An inſurance is merely a contract of indemnity, in caſe of loſs; it follows as a neceſſary conſequence that a man ſhall not recover more than he has loſt, or recover ſatisfaction greater than the injury he has ſuſtained. This rule was wiſely eſtabliſhed, in order to prevent fraud, leſt the deſire of gain ſhould occaſion unfair and wilful loſſes. It being thus ſettled, that the inſured ſhall recover but one ſatisfaction, and that in caſe of a double inſurance, he may fix upon which of the underwriters he will for the payment of his loſs, it is a principle of natural juſtice that the ſeveral inſurers ſhould all of them contribute in their ſeveral proportions, to ſatisfy that loſs, againſt which they have all inſured.

19 Geo. II. c. 37. ſ. 4.
1 Black. Rep. 416.
1 Burr. 494.

Theſe principles have been fully declared to be law in ſeveral caſes, which are now to be mentioned.

In the year 1763, it was ruled by Lord *Mansfield*, Chief Juſtice, and agreed to be the courſe of practice, that upon a double inſurance, though the inſured is not entitled to two ſatisfactions; yet, upon the firſt action he may recover the whole ſum inſured, and may leave the defendant therein, to recover a rateable ſatisfaction from the other inſurers.

Newby v. Reed, Sitt. in London in Eaſter Vacat. 1763.
1 Black. Rep. 416.

Thus alſo it was determined in a ſubſequent caſe at *Guildhall*. It was an action on a policy of inſurance on a ſhip from *Newfoundland* to *Dominica*, and from thence to the port of diſcharge in the *Weſt Indies*. It was a valued policy on the ſhip and freight; and on the goods as intereſt ſhould appear. The ſhip ſailed from *St. John's* the 17th of *December* 1775, and the plaintiff declared as for a total loſs. The defendant underwrote for 200 *l.* and has paid into court 124 *l.* This ſum was paid on a ſuppoſition, that the underwriters on a former policy ſhould bear

Rogers v. Davis, Sittings in Mich. Vac. 17 Geo. III. before Lord Mansfield.

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bear a ſhare of the loſs. The plaintiff had originally inſured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Iſlands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpoſe of ſecuring himſelf againſt captures, and having altered the courſe of his voyage, made the preſent inſurance. The plaintiff now inſiſted he was

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entitled to receive the full amount of his inſurance againſt the defendant, and not to any part from the *Liverpool* underwriters, becauſe the voyage now inſured was different from that inſured at *Liverpool*. There was however a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action againſt the Liverpool underwriters, if he thought fit.*

* Davis v. Gildart, Sittings in Eaſt. Vac. 17 Geo. III. at Guildhall.

Accordingly in the *Eaſter* term following, an action was brought for money had and received to the uſe of the plaintiff, who was the defendant in the laſt cauſe, in order to recover a contribution for the loſs which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the ſubject of the former action), 2200*l.* were inſured: that on the two *Liverpool* policies 1700*l.* were inſured: that the merchant was intereſted to the amount of 500*l.* on the ſhip; 300*l.* on the freight; and 1400*l.* on the cargo. That the plaintiff had paid 200*l.* loſs, and 47*l.* for the coſts. The queſtion was, whether the defendant was liable to contribute any thing, and what. The whole intereſt was 2200*l.* and the whole inſurance was 3900*l.* It was inſiſted by the counſel for the defendant, that the inſurance in *London* was an illegal re-aſſurance; and therefore the plaintiff might have made a good defence in an action brought againſt him: and if ſo, he could not now recover over againſt the defendant.

Lord *Mansfield*.—"The queſtion ſeems to be whether the inſured has not two ſecurities for the loſs that has happened. If ſo, can there be a doubt that he may bring his action againſt either? It is like the caſe of two ſecurities; where, if all the money be recovered againſt one of them, he may recover a proportion from the other. Then this would bring it to the queſtion, whether the ſecond inſurance is void as a *re aſſurance*. But a re-aſſurance is a contract made by the inſurer to ſecure himſelf;

himſelf; *and this is only a double inſurance.*" There was another ground taken in the cauſe, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict. CHAP. XV.

Although a man, by making a double inſurance, ſhall not be allowed to recover a double ſatisfaction for the ſame loſs; yet various perſons may inſure various intereſts on the ſame thing, and each to the whole value (as the maſter for wages; the owner for freight; one perſon for goods, another for bottomry), and ſuch a contract does not fall within the idea of a double inſurance. There is a full caſe upon this ſubject, and a very elaborate argument of Lord *Mansfield*, in delivering the judgment of the whole court of King's Bench, in which moſt of the queſtions relative to double inſurances are clearly and deciſively ſettled. In this cauſe the queſtion was, whether the plaintiff ought to recover his whole loſs, or only a half; it being objected that there was a double inſurance. A verdict was found for the whole, ſubject to the opinion of the court upon Lord *Mansfield*'s report. 1 Burr. 496. [283] Godin and others v. The London Aſſu. Comp. 1 Burr. 489. 1 Black. Rep. 103.

Lord *Mansfield*, in delivering the opinion of the court, began, by ſtating the facts, as they appeared to him at the trial.

Mr. *Meybohm* of *St. Peterſburg* had dealings with Mr. *Amyand* and Company of *London*, who often ſent ſhips from *London* to Mr. *Meybohm* at *St. Peterſburg*. *Meybohm*, as appeared by the evidence, was indebted, on the balance of their accounts, to *Amyand* and Company. *Amyand* and Company ſent a ſhip, called *The Galloway*, *Stephen Barker* maſter, to Mr. *Meybohm*, at *St. Peterſburg*, to fetch certain goods. *Meybohm* ſent the goods, and promiſed to ſend the bill of lading by the next poſt, but never did. Afterwards, in *Auguſt* 1756, *Amyand* and Company got a policy of inſurance from private underwriters, for 1100*l.* on the ſhip, tackle, and goods, at and from *London* to *St. Peterſburgh*, and at and from thence back again to *London:* which policy was ſigned by ſeveral private underwriters, quite different perſons from the preſent defendants; and of this ſum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{11}{20}$ parts of the ſhip, and the remaining 600*l.* to be on goods. Between the 26th of *Auguſt* and the 28th of

September

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September 1756, (both included), Mr. *Amyand* inſured 800 *l.* more, with other private inſurers: and this latter inſurance was upon goods only: and was only at and from *St. Peterſburg* to *London*. On the 28th, 29th, and 30th of *October* 1756, Mr. *Amyand* inſured 900 *l.* more with other private inſurers, which laſt inſurance was on goods only, at and from the *Sound* to *London*. So that the whole ſum inſured by *Amyand* and Company was 2800 *l.* of which the ſum of 2300 *l.* was on goods, and the remaining 500 *l.* was on the ſhip. Several letters being given

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in evidence, it appeared that *Meybohm* wrote from *Petersburg* on the 7th of *September* 1756 (the date of his firſt letter on this ſubject) to *Amyand* and Company; and mentioned what goods he ſhould ſend to them, referring to the invoice for particulars; and directed them to get inſurance thereon, and to place the goods and the inſurance to a particular account which he named in his letter; in which he alſo ſpecified ſome iron, which was for Mr. *Amyand*'s own account. This letter Mr. *Amyand* afterwards received (probably about the 27th of *October*) and in conſequence of it made the inſurance accordingly, upon the 28th, 29th, and 30th of the ſame *October*, as before-mentioned. *Meybohm*, having ſhipped the goods, indorſed the bills of lading to one Mr. *John Tameſz* in *Moſcow* (the plaintiff, in effect, in the preſent action) who, on the 7th of *October* 1756, wrote to his correſpondent Mr. *Uhthoff* here in *London* to inſure theſe goods. In this letter, he deſires Mr. *Uhthoff* to inſure the *whole*, that he (*Tameſz*) might be ſafe in all events; for he ſuſpected that theſe goods were intended to be conſigned by *Meybohm* to ſomebody elſe, and perhaps might be inſured by ſome other perſons. And he ſays they were transferred to him, in conſideration of his being in advance to *Meybohm* more than their amount. This letter from Mr. *Tameſz*, with theſe directions to inſure, was received by Mr. *Uhthoff*, on the 15th of *November* 1756. Mr. *Uhthoff* accordingly applied to the defendants, the *London* Aſſurance Company; and diſcloſed to them, at the ſame time, all theſe particulars: and they, upon the 16th of *November* 1756, after being thus appriſed, *that there might be another inſurance*, made the inſurance now in queſtion, for 2316 *l.* on the goods at and from the *Sound* to *London*. The goods were loſt in the voyage. Mr. *Uhthoff*'s

inſurance

insurance was made by the plaintiffs *Godin, Guyon*, and Company, who are insurance brokers: and they declare that this insurance was made by order of *Henry Uhthoff* esq. This declaration is indorsed upon the policy, and is dated the 18th of *November* 1756. There is no doubt as to the value of the goods, or as to the loss of them. It is admitted by the defendants, that the plaintiffs ought to recover half the loss from them: but they say they ought to pay *only half*, not the *whole* of the loss. So that the only question is, whether the plaintiffs are entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the *whole loss* from the present defendants; or only the *half* of his loss from *them*, and [285] the remainder from the underwriters of Mr. *Amyand's* policy. The verdict is found for the plaintiff, for the whole: but it is agreed to be subject to the opinion of this court, upon the question I have just mentioned.

First, to consider it as between the insurer and insured. As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole: for they have received a premium for the whole risk. Before the introduction of wagering policies, it was upon principles of convenience very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss; and therefore the insurance ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them *contribute pro rata*, to satisfy that loss, against which they have all insured. No particular cases are to be found on this head: or, at least, none have been cited by the counsel on either side. Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his

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his own name, but one or both of them in the name of another perſon, yet that is juſt the ſame thing; for the ſame perſon is to have the benefit of both policies. And if the whole ſhould be recovered from one, he ought to ſtand in the place of the inſured, to receive contribution from the other, who was equally liable to pay the whole. But in this caſe if *Tameſz* was not to have the benefit of both policies in all events, then it can never be conſidered as a double policy.

It has been ſaid, that the indorſement of the bills of lading transferred *Meybohm*'s intereſt in all policies, by which the cargo aſſigned was inſured; and therefore *Tameſz* has a right to Mr. *Amyand*'s policy; and that *Tameſz*, being the aſſignee of
[286] *Meybohm*, is the *ceſtuy qui truſt* of it, and may recover the money inſured; and even that he may bring trover, or detinue, for the very policy itſelf: and it is urged from hence, that he either will, or may, have a double ſatisfaction for the ſame loſs.

But allowing that by the indorſement of the bills of lading and aſſigning the cargo to *Tameſz*, he ſtands in the place of *Meybohm* in reſpect of his inſurances; yet Mr. *Amyand* has an intereſt of his own, and had actually inſured the ſhip and goods, to the amount of 1900 *l.* (upon both together) prior to any directions or intimation received from Mr. *Meybohm*, to inſure for him. Various people may inſure various intereſts on the ſame bottom: (as one perſon for goods, another for bottomry, *&c.*) And here, Mr. *Amyand* had an intereſt of his own, diſtinct from that of Mr. *Meybohm*: he had a lien upon theſe very goods as a factor to whom a balance was due. And he had the ſole intereſt in the ſhip; which was a part of the things inſured by him. It is far from appearing, that even his laſt inſurance (in *October*) was made on the account of *Meybohm*, or as agent for him. So far from it, Mr. *Amyand* inſiſts upon it for his own benefit (as he expreſsly declared at the trial), and abſolutely refuſes to give it up, or to ſuffer his name to be uſed by the plaintiff; though he was a witneſs for the defendants, and was produced by them, and inclined to ſerve them. So that the foundation of this argument, urged by the defendant's counſel, fails them; and there is, in reality, nothing to ſupport it. But

even

even ſuppoſing that Mr. *Amyand* had made his inſurance, not upon his own account, but as agent or factor for Mr. *Meybohm*, and upon the account of *Meybohm*; yet even then *Tameſz* can never come againſt *Amyand*'s underwriters, or come at *Amyand*'s policy to his own uſe. For *Amyand*, the factor of *Meybohm*, has poſſeſſion of the policy, and appears to have been a creditor of *Meybohm* upon the balance of accounts between them, at the time when he made the inſurance: and I take it to be now a ſettled point, "that a factor to whom a balance is due, has a "lien upon all goods of his principal, ſo long as they remain in "his poſſeſſion." *Kruger* and others v. *Wilcox* and others, was a caſe in Chancery upon this point. It came on firſt before Sir *John Strange*, then Maſter of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ſhip or cargo, and reſerved all further directions till after the maſter's report. It came on again, afterwards, for further directions, after the maſter's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publickly. After which he took time to conſider of it; and on the firſt of *February* 1755, decreed, "that the factor has a lien on goods "conſigned to him; not only for incident charges, but as an "item of mutual account for the general balance due to him ſo "long as he retains the poſſeſſion. But if he part with the poſ-"ſeſſion of the goods, he parts with his lien, becauſe it cannot "then be retained as an item for the general account." There was another caſe, in the ſame court, of *Gardiner* v. *Coleman*, a few months after; in which the former caſe, determined as I have mentioned, was conſidered as a point ſettled; and this latter caſe of *Gardiner* v. *Coleman* was decreed agreeably to it. So that Mr. *Amyand*, even conſidered as factor or agent to *Meybohm*, and as making the inſurance upon *Meybohm*'s account, is yet entitled to retain the policy; *Meybohm* being indebted to him upon the balance of the account between them; and he has a lien upon the policy, whilſt it continues in his poſſeſſion. Therefore, even in this view of the caſe, Mr. *Tameſz* muſt firſt have paid to *Amyand* the balance of his (*Amyand*'s) account, before he could have gotten that policy out of *Amyand*'s hands; and conſequently, Mr. *Tameſz* was very far from being entitled to the benefit of it as a *ceſtuy qui truſt*, abſolutely and entirely.

Ambler's Rep. 252.

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But if the queſtion, "whether *Tameſz* could take the benefit of Mr. *Amyand*'s policy," were doubtful; yet here, *Tameſz* inſured the goods with the defendants, expreſsly under the declaration of his ſuſpicion, that there might have been a former conſignation, and ſome former inſurance made upon the goods by ſome other perſon: but he deſired to inſure the whole for his own ſecurity; and to this the defendants agreed, and took the whole premium. Mr. *Amyand* inſiſted upon his right to the whole benefit of his own policy, when he was examined as a witneſs; and is now litigating it in Chancery. It would neither be juſt nor reaſonable, that *Tameſz* ſhould only recover half of his loſs from the defendants, and be turned round for the other half, to the uncertain event of a long and expenſive litigation. I do not believe there ever will or can be a recovery

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by *Tameſz*, or thoſe who ſhall ſtand in his place, againſt *Amyand*'s underwriters. However, if thoſe underwriters are liable to contribute at all, the contribution ought to be among the ſeveral inſurers themſelves: but *Tameſz*, the inſured, has a right to recover his whole loſs from the defendants, upon the policy now in queſtion, by which they are bound to pay the whole. For though here be two inſurances, yet it is not a double inſurance; to call it ſo is only confounding terms. If *Tameſz* could recover againſt both ſets of inſurers, yet he certainly could not recover againſt the underwriters of *Amyand*'s policy, without ſome expence; nor without alſo firſt paying and reimburſing to Mr. *Amyand* the premium he paid, and alſo his charges. This is by no means within the idea of a double inſurance. Two perſons may inſure two different intereſts; each to the whole value; as the maſter, for wages; the owner, for freight, *&c.* But a double inſurance is where the ſame man is to receive two ſums inſtead of one, or the ſame ſum twice over, for the ſame loſs, by reaſon of his having made two inſurances upon the ſame goods, or the ſame ſhip. Mr. *Tameſz* is entitled to receive the whole from the defendants, upon their policy; whatever ſhall become of Mr. *Amyand*'s policy: and they will have a right in caſe he can claim any thing under Mr. *Amyand*'s policy, to ſtand in his place, for a contribution to be paid by the other underwriters to them. But ſtill they are certainly obliged to pay the whole to him. Therefore upon theſe grounds and principles, in every light in which

which the caſe can be put, we are all of us clearly of opinion, that the verdict is right, as it now ſtands for the whole; and that the *poſtea* muſt be delivered to the plaintiff. CHAP. XV.

In the courſe of what has been ſaid upon double inſurance, no notice has been taken of the laws of foreign ſtates reſpecting that point: the reaſon of this ſilence is the great contrariety to be found in their laws upon the ſubject; it being almoſt impoſſible to mention two countries, whoſe regulations, as to this matter, are ſimilar. In one the contract is abſolutely void, and a forfeiture enſues: in others, if the firſt policy amount to the value of the effects laden, the other inſurers ſhall withdraw their inſurance, retaining one half *per cent.* and in ſome other countries, the double inſurance is merely void, without any forfeiture being incurred. When there is ſuch a diverſity in the ordinances upon the ſubject, it ſeemed needleſs to enter into them, eſpecially as the law of *England* with reſpect to double inſurance is ſo clear, and ſo well founded in reaſon and natural juſtice, as to require no illuſtration or confirmation from the laws of any other country.

Ord. of Middleb. 2 Mag. p. 77. Ord. of Fran. and Stockh. 2 Mag. 172. 267. Ord. of Bilboa, 2 Mag. p. 411.

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Having, in this and the five preceding chapters, treated of thoſe circumſtances, by which the contract of inſurance is rendered void from its commencement, on account of ſome radical defect, which prevents the policy from ever having any operation at all: and having, in the courſe of that enquiry, been led into a variety of diſcuſſion, involving in it a very material part of the law of inſurance: we ſhall proceed to ſhew in what caſes the policy, although not void *ab initio*, is rendered of no effect, becauſe the inſured has not himſelf fully complied with thoſe conditions, which he has either *expreſsly* or *tacitly*, from the nature of his contract, undertaken to perform. It was indeed obſerved in the firſt chapter of this work, that although the policy is not ſubſcribed by the inſured, yet there are certain conditions to be performed on his part, with as much good faith and integrity as if his name appeared at the foot of the policy: otherwiſe it is a dead letter, and he can never recover an indemnity for any loſs, which he may happen to ſuſtain.

Vide ante, p. 1.

CHAPTER THE SIXTEENTH.

Of Changing the Ship.

CHAP. XVI.

OF thoſe cauſes, which will operate as a bar to the inſured's recovering upon a policy of inſurance, againſt the underwriter, the firſt to be mentioned is that of changing the ſhip; or, as it has commonly been called, changing the bottom. This will require but very little diſcuſſion. We formerly ſaid, that except in ſome ſpecial caſes of inſurances upon *ſhip or ſhips*, it was eſſentially requiſite to render a policy of inſurance effectual, that the name of the ſhip, on which the riſk was to be run, ſhould be inſerted. That being done, it follows as an implied condition that the inſured ſhould neither ſubſtitute another ſhip for that mentioned in the policy before the voyage commences, in which caſe there would be no contract at all: nor during the courſe of the voyage remove the property inſured to another ſhip, without the conſent of the underwriter, or without being impelled by a caſe of unavoidable neceſſity. If he do, the implied condition is broken, and he cannot recover a ſatisfaction, in caſe of a loſs, from the inſurer; becauſe the policy was upon goods, on board a particular ſhip, or upon the ſhip itſelf; and it becomes a material conſideration in a contract of inſurance, upon what veſſel the riſk is to be run; ſince the one may be much ſtronger, and more able to reſiſt the perils of the ſea; or by its ſwift ſailing, much better able to eſcape from the purſuit of an enemy, than the other.

Vide ante, c. 1.

Malyne, it is true, in his *Lex Mercatoria*, appears to be of a different opinion; for he ſays, "It ſometimes happens, that "upon ſome ſpecial conſideration, this clauſe forbidding the "transferring of goods from one ſhip to another is inſerted in "policies of aſſurance; becauſe in time of hoſtility or war "between princes, it might be unladen, in ſuch ſhips of thoſe "contending princes, by which the adventure would be en-"creaſed. But according to the uſual inſurances which are "made generally without an exception, the aſſurer is liable

Mal. Lex Merc. 118.

"thereunto; for it is underſtood, that the maſter of a ſhip, "without ſome good and accidental cauſe, would not put the "goods from one ſhip to another, but would deliver them, "according to the charter-party, at the appointed place." The reaſon given by *Malyne*, in ſupport of his poſition, is by no means ſatisfactory, nor is it well founded in point of experience: neither has he adduced a ſingle authority to corroborate the opinion advanced. Indeed, the whole current of authority turns the other way: at leaſt, as far as I have been able to trace it.

Molloy has ſaid, that if goods are inſured in ſuch a ſhip, and afterwards in the voyage ſhe becomes leaky and crazy, and the ſupercargo and maſter, by conſent, become freighters of another veſſel for the ſafe delivery of the goods; and then after ſhe is loaded, the ſecond veſſel miſcarries, the aſſurers are diſcharged. It is true, the ſentence proceeds thus: "If theſe "words be inſerted, namely, *the goods laden to be tranſported* "*and delivered at ſuch place by the ſaid ſhip, or by any other ſhip,* "*or veſſel, until they be ſafely landed*, the inſurers muſt anſwer "the misfortune." But this does not at all affect the general rule before laid down; for it only goes to ſhew that, which is not denied, that the parties may take a caſe out of the general rule of law, by a ſpecial agreement: and the exception proves the truth of the firſt propoſition. Beſides, in ſuch a caſe, it ſhould ſeem that the ſhip, in which the goods are laden, ought not to be changed, but upon neceſſity.

Molloy, l. 2. c. 7. ſ. 11.

This opinion is confirmed by foreign writers. "Merces ſi "eâdem navigatione transferantur de unâ navi in aliam, et "ſi noviſſima navis, ubi merces transfuſæ fuerunt, deperdatur, "tunc eſt inſpicienda forma aſſecurationis, in quâ ſi fuit dictum, "quod aſſecurentur merces, *quæ ſunt in tali navi*, tunc *aſſecu-* "*rator non tenetur*, eo quod mentionem fecit in aſſecuratione "de tali navi. Et ratio eſt, quia non par eſt ratio aſſecura- "tionis, *quando merces devehuntur in una navi, et quando in* "*alterâ*; imo ſolet id principaliter conſiderari inter ipſos aſſe- "curatores, cum *una navis ſit magis fortis quam alia.*" *Roccus*

Roccus de Aſſecurat. Not. 28.

Santer, de Aſſecurat. p. 3. n. 35. Stracca gloſ. 8. n. 10.

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is corroborated by ſeveral learned writers upon this branch of juriſprudence.

In the law of *England*, there is only one caſe to be met with in print upon the ſubject; and that is not expreſsly in point to the preſent enquiry, although it ſeems to decide it. It was a caſe which came on at *Guildhall* before Lord Chief Juſtice *Lee*. The plaintiff had inſured intereſt or no intereſt on *any ſhip* he ſhould come in from *Virginia* to *London*, beginning the adventure *on his embarking* on board ſuch ſhip; the money to be paid though his perſon ſhould eſcape, or the ſhip be retaken. He embarked on the *Speedwell*; but ſhe ſpringing a leak at ſea, he went on board the *Friendſhip*, and arrived ſafe at *London*: but the *Speedwell* was taken after he left her. And now, in an action againſt the underwriter, he was held liable; for the inſurance is on the ſhip the plaintiff ſet out in: *and had that got ſafe home and the other been loſt*, the plaintiff could not have recovered upon the ground of having removed his perſon into that ſhip in the middle of the voyage.

Dick v. Barrell, 2 Stra. 1248.

From this caſe it appears, that although no ſhip was named in the policy, yet the moment the ſhip was aſcertained by the embarkation of the inſured, the contract was at an end, provided the ſecond ſhip had been loſt; for ſo the words in *Italicks* expreſsly import. *A fortiori*, therefore, the inſured could not be entitled to recover, upon a change of the bottom, when the name of the veſſel is expreſsly mentioned in the very inſtrument by which the contract is effected. And although the inſured, notwithſtanding the change of bottom, recovered in the caſe cited from *Strange*; it may be accounted for in two ways, conſiſtent with the doctrine advanced in this chapter. In the firſt place, it was a gaming policy, intereſt or no intereſt; and the plaintiff was entitled to recover the moment the ſhip was taken, although he might perhaps not be intereſted at all; or perhaps the effects inſured might be left in the firſt ſhip, although the plaintiff removed his perſon; in which caſe even at this day, upon a fair *bonâ fide* policy, he would be entitled to recover from the underwriters a ſatisfaction for the loſs he had ſuſtained.

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The general doctrine relative to changing the bottom of the ſhip was alluded to by Lord *Mansfield*, when delivering the opinion of the court in the caſe of *Pelly* againſt the *Royal Exchange* Aſſurance company, which has already been fully reported in a preceding chapter. "One objection," ſaid his Lordſhip, "was formed by comparing this caſe to that of "changing the ſhip or bottom, on board of which goods are "inſured: *which the inſured have no right to do* (*a*). For "there the identical ſhip is eſſential; *that* is the thing in-"ſured. But that caſe is not like the preſent."

Vide ante, c. 4, p. 41. 1 Burr. 351.

From this paſſage it is evident, that Lord *Mansfield* intended to confirm the principle advanced in this chapter, namely, that when an inſurance is made on a ſpecific ſhip, and the inſured not being impelled by any neceſſity, without the conſent of the underwriter, changes the ſhip in the courſe of the voyage, he has not kept his part of the contract, and cannot recover againſt the underwriter.

(*a*) This is to be taken as a rule, ſubject to the exception of inevitable or urgent neceſſity: for it has been held, that the owners of goods inſured, by the act of ſhifting the goods from one ſhip to another, do not preclude themſelves from recovering an average loſs ariſing from the capture of the ſecond ſhip, if they act from neceſſity, and for the benefit of all concerned. See *Plantamour* v. *Staples*, 1 Term R. 611. note (a) and ante, chap. 1.

CHAPTER THE SEVENTEENTH.

Of Deviation.

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DEVIATION, in marine inſurances, is underſtood to mean a voluntary departure, without neceſſity or any reaſonable cauſe, from the regular and uſual courſe of the ſpecifick voyage inſured. Whenever a deviation of this kind takes place, the voyage is determined; and the underwriters are diſcharged from any reſponſibility. It is neceſſary, as we have ſeen, to inſert in every policy of inſurance, the place of the ſhip's departure, and alſo of her deſtination. Hence it is an implied condition to be performed on the part of the inſured, that the ſhip ſhall purſue the moſt direct courſe, of which the nature of things will admit, to arrive at the deſtined port. If this be not done: if there be no ſpecial agreement to allow the ſhip to go to certain places out of the uſual track; or if there be no juſt cauſe aſſigned for ſuch a deviation; it is but juſt and reaſonable, that the underwriter ſhould no longer be bound by his contract, the inſurer having failed to comply with the terms on which the policy was made. For if the voyage be changed after the departure of the ſhip, it becomes a different voyage, and not that, againſt which the inſurer has undertaken to indemnify: (which is the true objection to a deviation) the riſk may be ten times greater, which probably the inſurer would not have run at all, or at leaſt would not, without a larger premium. Nor is it at all material, whether the loſs be or be not an actual conſequence of the deviation; for the inſurers are in no caſe anſwerable, for a ſubſequent loſs, in whatever place it happen, or to whatever cauſe it may be attributed. Neither does it make any difference, whether the inſured was, or was not, conſenting to the deviation.

Vide ante, c. 1.

Roccus, Not. 52.

Doug. Rep. 288.

Theſe principles have been eſtabliſhed by many deciſions in the various courts of *Weſtminſter Hall*, and alſo by a ſolemn determination in the Houſe of Lords.

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The plaintiff was a ſhipper of goods in a veſſel bound from *Dartmouth* to *Liverpool*: the ſhip ſailed from *Dartmouth*, and put into *Loo*; a place *ſhe muſt of neceſſity paſs by*, in the courſe of the inſured voyage. But as ſhe had no liberty given her by the policy to go into *Loo*, and although no accident befel her in going into, or coming out of *Loo*, (for ſhe was loſt after ſhe got out to ſea again), yet Mr. Juſtice *Yates* held that this was a deviation, and a verdict was accordingly found for the underwriters.

Fox v. Black, Exeter aſſizes 1767, before Mr. Juſtice Yates.

In another caſe, an action was brought upon a policy on goods and other merchandizes, loaded on board the ſhip called the *Charming Nancy*, from *Dunkirk* to *Leghorn*. The ſhip came to *Dover* in her way to procure a *Mediterranean* paſs; and was afterwards loſt.

Townſon v. Guyon, before Lord Mansfield.

Lord *Mansfield* was of opinion, that the calling at *Dover* was a deviation; and the plaintiff was nonſuited.

It was alſo held by Lord Chief Juſtice *Lee*, that if the maſter of a veſſel put into a port not uſual, or ſtay an unuſual time, it is a deviation, and diſcharges the inſurer.

It has alſo been held that even where there is a permiſſion given to *touch and ſtay at* a place, that confers no privilege on the aſſured to *break bulk*, or to unload any part of the cargo. The caſe which was ſo decided was an inſurance on goods at and from *Whitehaven* to *St. Michael's*, with liberty to touch and ſtay at any place or places whatſoever, *and particularly at Cork in her paſſage out*. The ſhip was driven by ſtreſs of weather *into Dublin*, and there ſhe unloaded a great part of the coals, of which her cargo conſiſted, and then proceeded on her voyage and was loſt.

Stitt v. Wardell, Sittings at Guildhall after Mich. 1797.

Lord *Kenyon* C. J. was of opinion that as the liberty given was only to *touch and ſtay*, but not *to trade*, the unloading and ſelling the coals, though the ſhip was not further delayed thereby, was a *breaking bulk*, and avoided the policy: and upon being aſked by the plaintiff's counſel, his lordſhip ſaid, he ſhould

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ſhould have been of the ſame opinion, if this *breaking bulk* had happened at *Cork*; and the plaintiff was nonſuited.

The next caſe to be reported underwent a variety of diſcuſſion in the ſeveral courts in *Scotland*; and in all of them judgment was given againſt the underwriters: but upon an appeal to the Houſe of Lords, the various decrees of the courts below were reverſed, agreeably to thoſe principles adduced in the beginning of this chapter, and which have been uniformly admitted as found law.

Elliot and others v. Wilſon and Co. 7 Brown's Parl. Caſes, p. 459.

The harbour of *Carron*, ſituate near the head of the *Frith* of *Forth*, is chiefly reſorted to by ſhips in the ſervice of the *Carron* Company, who have a great iron work and conſiderable collieries in the neighbourhood. From thence veſſels, intended principally to convey the manufactures of the company, their coals, and ſuch goods as may be offered them on freight, ſail periodically for *Hull*, and other places on the *Eaſtern* coaſt of *England*. This is a coaſting or carrying trade, the veſſels in going down the *Frith* touching at different places to take in additional loading, or to diſcharge part of what they have received at places higher in the river. Particularly it is uſual for theſe [296] veſſels to call at *Borrowſtounneſs* and *Leith*, and at *Morriſon's Haven*, a port ſix miles farther down the *Frith*, and on the ſame ſide with *Leith* in the bay of *Preſtonpans*. In *February* 1774, the reſpondents had occaſion to ſhip fourteen hogſheads of tobacco on board one of theſe veſſels for *Hull*; and deſiring to inſure them, gave the following inſtructions in writing to *Hamilton* and *Bogle*, inſurance brokers in *Glaſgow*: "Pleaſe to inſure "for our account by the *Kingſton*, *George Finlay*, maſter, from "*Carron* to *Hull*, *with liberty to call as uſual*, fourteen hogſheads "of tobacco;" and theſe inſtructions were entered in the broker's books for the peruſal of the underwriters, as is the practice at *Glaſgow*. Upon the 9th of *February*, the appellants underwrote a policy of inſurance in theſe terms; "beginning "the adventure of the ſaid tobacco, at and from the loading "thereof on board the ſaid ſhip *Kingſton* at *Carron* wharf, and "to continue and endure until ſaid *Kingſton* (*being allowed a* "*liberty to call at Leith*) ſhall arrive at *Hull*, and there be ſafely "delivered."

"delivered." The reſpondents were not privy to the allowance to call at *Leith*, being thus ſubſtituted in the policy for the more general term, *as uſual*, mentioned in the inſtructions to the broker. The premium agreed on was 1*l.* 5*s. per cent.* a rate equal at leaſt, if not higher, than was uſual to be given in the voyage, in caſes where it was underſtood, or expreſſed in the policy, that the veſſel might touch at the cuſtomary ports. And in particular, ſome of theſe appellants in *February* 1772, underwrote a policy upon this very veſſel, and for the ſame voyage, with liberty to call at *Leith* and *Morriſon's Haven*, at a premium of one *per cent.* only. The veſſel thus inſured had ſailed from *Carron* five days before the date of the policy, that is, on the 4th of *February* 1774, it did not call or touch at *Leith*, *but put into Morriſon's Haven*: ſet ſail from thence on the 9th, got ſafe into the direct courſe from *Carron* to *Hull*, cleared the *Frith* of *Forth*, and proceeded with a fair wind, till on the evening of the 10th the veſſel, being overtaken by a ſtorm at *Holy Iſland*, on the coaſt of *Northumberland*, was wrecked and the cargo totally loſt. All theſe were facts admitted; nor was it alleged by the appellants, that the ſhip received the ſmalleſt damage in going into or coming out of *Morriſon's Haven*. Intelligence of this misfortune reached *Glaſgow* on the 14th of *February*, when the reſpondents for the firſt time ſaw the policy of inſurance, or underſtood that it differed in terms from their inſtructions to the broker, in whoſe hands it remained. [297] It did not, however, occur to them, that this ſlight variation would afford a pretext to the underwriters for refuſing payment; nor does it ſeem to have then occurred to thoſe gentlemen, who wrote immediately to the reſpondents, deſiring they would requeſt the *Carron* Company to give the neceſſary orders for preſerving the tobacco, and forwarding it to *Hull*, promiſing to contribute towards the expence, ſo far as they were intereſted. Upon the 24th of *February*, however, the appellants, in an inſtrument drawn by a publick notary, proteſted againſt the ſhip's having gone into *Morriſon's Haven*, as a deviation from the terms of the policy, which only contained a liberty to call at *Leith*; and abſolutely refuſed payment of the loſs. On this refuſal, the reſpondents brought their action againſt the appellants in the court of admiralty in *Scotland*, the only competent court

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for determining queſtions about inſurances, and other maritime affairs in that country, in the firſt inſtance. The appellants put in their defence, which was followed by other pleadings, in *January* 1775, the Judge Admiral pronounced the following interlocutor (or decree): "Having conſidered the whole cir- "cumſtances of this caſe, and in particular that it is not alleged "by the defenders, that the purſuers were in the knowledge of "the ſhip the *Kingſton* being intended to put into *Morriſon's* "*Haven*, he repels the defence pleaded by the defenders." The appellants reclaimed againſt this interlocutor, (petitioned for a review of the ſentence), and anſwers being put in to their petition, the Judge Admiral, becauſe they ſet forth, and ſeemed to found on converſations between them and the brokers, at the time of underwriting or ſettling the terms of the policy, allowed them to bring proof of what paſſed at and previous to making the inſurance. But the appellants preſented a ſecond petition, declining to go into any proof, inſiſting that the cauſe turned ſingly upon the words of the policy, and demanding judgment on the abſtract queſtion, whether the veſſel touching at *Morriſon's Haven*, when not allowed by the policy, diſcharged the underwriters? whereupon the Judge again decreed in favour of the reſpondents. The appellants then ſued out a writ of ſuſpenſion from the Court of Seſſion, of theſe ſentences of the Judge Admiral; and after the uſual preliminary ſtep of procedure before the Lord Ordinary, the cauſe being reported to the whole bench of Lords, their Lordſhips having before them

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the opinions of ſeveral of the moſt eminent merchants both in *England* and *Scotland*, gave judgment for the reſpondents, in the month of *January* 1776, in the following terms: "Hav- "ing adviſed informations, *hinc*, *inde*, and conſidered the "policy of inſurance and the whole circumſtances of the caſe, "the Lords repel the reaſons of ſuſpenſion, find the letters "orderly proceeded," (that is, that the appellants were obliged to pay the ſums underwritten, in terms of the Judge Admiral's decree), "and their Lordſhips decree accordingly." The appellants having alſo reclaimed againſt this interlocutor, it was, in *March* 1776, finally confirmed. From theſe ſeveral decrees the preſent appeal was brought; and the Houſe of Lords were of opinion, that a wilful deviation from the due courſe of the inſured

insured voyage, is in all cases a determination of the policy; that, from that moment, the engagement between the insurers and insured is at an end; that it is immaterial from what cause, or at what place, a subsequent loss arises, the insurers being in no case answerable for it: that the going into *Morrison's Haven* was a wilful deviation from the due course of a voyage from *Carron* to *Hull*: that though it may be true, as contended on the part of the respondents, that ships sailing through the *Frith* of *Forth* have sometimes been permitted by the terms of a policy, underwritten at the same premium as the present, to go into that port, it could not avail in the present case, since the policy in question had given no such permission. It was therefore ORDERED AND ADJUDGED that the interlocutors complained of should be reversed.

In a late case upon a policy of insurance on a ship "*at and from Fisherow to Gottenburgh, and back to Leith and Cockenzie,*" it appeared that in the homeward voyage, she went *first* to *Cockenzie*, which lay nearer to *Gottenburgh* than *Leith*, and was stranded in the harbour of *Cockenzie*. There was a good deal of evidence given to shew that *Leith* harbour was the safer of the two; but the jury seemed to be of opinion, according to a note taken by Lord *Kenyon* at the time, that the construction of the policy was to be made by attending to the order in which the places were named in it. The jury, however, by consent of parties, to save the expence of going to trial again, found a verdict for the plaintiff, with permission to enter a verdict for the defendant, if the court should agree that the above construction was the true one. The case came on to be discussed in court; and they were of opinion, that unless there be some usage proved, or some special facts to vary the general rule, the party insured must go to the several places mentioned in the policy, in the order in which they are named; and that to depart from that course is a deviation: and one of the Judges added, that the parties by inserting the names contrary to the *natural* order of the places, shewed it to have been the intention of the parties to vary the natural course of the voyage. A verdict was entered for the defendant.

Beatson v. Howarth, 6 Term Rep. 531.

In

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In the argument of the preceding caſe, another was quoted by one of the learned Judges, as having been decided before Lord Chief Juſtice *Lee*, where in an inſurance on the *Gothic Lyon at and from London to her ports of diſcharge in the Streights as high as Meſſina*, his Lordſhip was of opinion, as ſhe did not ſtop at *Marſeilles* (for which place ſhe had a cargo) in her way to the Streights, but meant to take it in her return, that this was acting contrary to the terms of the policy: for by her ports of diſcharge, muſt be underſtood ſuch ports as it was intended goods ſhould be delivered at, and the firſt of theſe was *Marſeilles*.

Claſon v. Simmond, at Guildhall, Hil. Sittings 1741.

So in a very late caſe, where a ſhip was inſured "at and "from *Liſbon* to a port in *England with liberty to call at any* "*one port in Portugal* for any purpoſe whatever:" and where the ſhip had ſailed from *Liſbon* to *Faro* to complete her loading, *Faro* being a port to the ſouthward of *Liſbon*; conſequently lying directly out of the courſe of the voyage to *England*: Lord *Kenyon* was of opinion that the liberty, given by this policy, muſt be reſtrained to a permiſſion to call at ſome port to the northward of *Liſbon*, in the courſe of the voyage to *England*; and that by going to the ſouthward the aſſured had been guilty of a deviation.

Hogg v. Horner, Sittings at Guildhall after Mich. Term, 1797.

Theſe principles being once eſtabliſhed, it follows, as a neceſſary conſequence, that however ſhort the time of deviation may be, if only for a ſingle night, or even for an hour, the underwriter is equally diſcharged, as if there had been a deviation for weeks or months: for the condition being once broken, no ſubſequent act can ever make it good.

The ſhip *George* was bound from *Cork* to *Jamaica* with a convoy in the courſe of a war: the captain, in concert with two other veſſels, took advantage of the night, and being ſhips of force, cruiſed, and thereby deviated out of the direct courſe of their voyage, in hopes of meeting with a prize. Lord *Camden* clearly held, and a ſpecial jury of merchants, agreeably to his directions, determined, that from the moment the *George* deſerted

Cock v. Townſon, C. B. before Lord Camden, Ch. Juſt.

deſerted or deviated from the *direct voyage* to *Jamaica*, the policy was diſcharged.

In a modern caſe, however, it ſeemed to be the general opinion of Lord *Mansfield*, and a ſpecial jury, and was ſworn to be the uſage by ſeveral witneſſes, that if a merchant ſhip carry letters of marque, ſhe may *chaſe* an enemy, though ſhe may not *cruiſe*, without being deemed guilty of a deviation.

On an inſurance of the *Mary* at and from *London* to *Cork* and the *Weſt Indies*, the queſtion was, whether a ſhip, having letters of marque, could *chaſe* an enemy's ſhip, without being ſaid to have deviated. The facts were, that in the night the *Mary* had deſcried a *Spaniſh* ſail; and after chaſing loſt ſight of her for ſix hours till the morning, when they engaged. The *Mary* did not make a prize of the *Spaniſh* ſail, but ſhe proceeded on her voyage, and was afterwards captured. It was agreed on all hands, that a ſhip, in ſuch circumſtances, might not cruiſe; and ſeveral witneſſes ſpoke to the uſage and practice of ſhips, which carried letters of marque, chaſing an enemy. It was admitted on the part of the inſurers, that if an enemy came in the way, the ſhip muſt defend or engage; but contended, that if the letter of marque loſt ſight of the enemy, that it was no longer chaſing, but cruiſing. Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs; thereby deciding the queſtion in the affirmative.

Jolly v. Walker, at Guildhall, Eaſt. Vac. 1781.

In a late caſe which came before the Court of King's Bench upon a motion for a new trial, the Judges were unanimouſly of opinion, that if the aſſured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, which by the prize act of the 33 *Geo.* III, ch. 66, ſ. 15, is abſolutely neceſſary to its validity), for the purpoſe of inducing the ſeamen to enter, and without any intention of cruizing, this does not ſo eſſentially vary the riſk as to avoid the policy.

Moſs v. Byrom, 6 Term R. 379. ante, p. 91.

The doctrine that a voluntary deviation from the voyage inſured vitiates the policy, has been held to be applicable to an inſurance

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insurance upon *freight* as well as to an insurance upon ship and goods,

Murdock v. Potts, Sittings at Guildhall, after Trin. 1795.

Thus in a case upon a policy of assurance *on freight* of the ship *Bethiah at and from Bourdeaux to Virginia*, warranted *American* ship and property: the declaration alleged that the ship was an *American* ship and the property of *American* sub-

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jects. The plaintiff proved the ship to be *American*, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but upon the evidence it appeared that the goods, whether *American* or not, *were to be carried in the ship from Bourdeaux to Saint Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect that the goods, upon which the freight was payable, were consigned to *Virginia*, and that if the freight was payable for the carriage of them from *Bourdeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured: plaintiff was nonsuited, and no application was made to set it aside.

Roccus n. 52.

But though the consequences of a voluntary deviation are fatal to the validity of the contract of insurance, yet wherever the deviation arises from necessity and a just cause, the underwriter still remains liable, although the course of the voyage is altered.

Elton v. Brogden, 2 Str. 1264. Vide ante, p. 87.

This rule is illustrated by the following case. The ship *Mediterranean* went out in the merchants service with a letter of marque, and bound from *Bristol* to *Newfoundland*, insured by the defendant. In her voyage she took a prize, and returned with it to *Bristol*, and received back a proportional part of the premium. Then another policy was made, and the ship set out, with express orders from the owners, that if another prize was taken, the captain should put some hands on board such prize,

prize, and ſend her to *Briſtol*; but that the ſhip in queſtion ſhould proceed with the merchants goods. Another prize was taken in the due courſe of the voyage, and the captain gave orders to ſome of the crew to carry her to *Briſtol*, and deſigned to go on to *Newfoundland:* but the crew oppoſed him, and inſiſted he ſhould go back, though he acquainted them with his orders; upon which he was forced to ſubmit, and on his return his own ſhip was taken, but the prize got in ſafe. And now in an action againſt the underwriters, it was inſiſted, that this was ſuch a deviation, as diſcharged them. But the court and jury held, that this was excuſed by the force upon the maſter, which he could not reſiſt; and therefore fell within the excuſe of neceſſity, which had always been allowed. So the plaintiff had a verdict for the ſum inſured.

The general writers upon this ſubject have enumerated the various circumſtances, which will operate as a juſtification to the inſured, for leaving the direct track of the voyage, upon the ground of neceſſity and reaſonable cauſe: ſuch as to repair his veſſel, to eſcape from an impending ſtorm, or to avoid an enemy. In our reports of deciſions in the *Engliſh* courts of juſtice, we find inſtances of all theſe various excuſes being allowed as ſufficient to juſtify a deviation; and alſo another ſpecies of excuſe, namely, to meet a convoy, which, indeed, is nearly connected with that of avoiding an enemy. I ſhall rank all the caſes, which apply to this branch of our enquiry, under theſe ſeveral diviſions.

Roccus 52. Santer de Aſſecur. part 3. n. 52.

The firſt ground of neceſſity which juſtifies a deviation, is that of going into port to repair. If a ſhip is decayed, and goes to the neareſt place to refit, it is no deviation; becauſe it is for the general intereſt of all concerned, and conſequently for that of the underwriters, that the ſhip ſhould be put in a proper condition, capable of performing the voyage.

The ſhip *Eyles*, being at *Bengal* in the year 1732, the owner employed a Mr. *Halhead* to inſure this ſhip in the *London* Inſurance Office for 500*l.* the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till

Motteux and others v. the London Aſſurance Company, 1 Atk. 545.

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the ſaid ſhip ſhould arrive at *London*; and that it ſhould be lawful for the ſaid ſhip, in the ſaid voyage, to ſtay at any ports or places without prejudice. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England*; but being leaky, and in very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, &c. *ſhe ſailed for Bengal to be refitted*; and after being ſheathed, in her return upon her homeward-bound voyage, ſhe ſtruck upon the *Engilee Sands*, and was loſt. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the proper place to refit, and that the ſhip went thither for that reaſon; that this was a voyage of neceſſity, and not a trading voyage, for ſhe took nothing on board but water, proviſions, and ballaſt. When this cauſe came on to be heard before Lord Chancellor *Hardwicke*, he refuſed to decide it, but directed an iſſue at law. His Lordſhip, however, obſerved, that the general principles laid down by the plaintiff's counſel were right, as ſtreſs of weather, and the danger of proceeding on a voyage, when a ſhip is in a decayed condition: and in ſuch a caſe, if ſhe went to the neareſt place, he ſhould conſider it equally the ſame, as if ſhe had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumſtance, that the governor ordered the lading to be taken out, to ſhew the neceſſity of the ſhip's being repaired; but there is not a ſyllable of proof why ſhe might not have been equally repaired at *Fort St. George*. His Lordſhip therefore directed an iſſue to try, whether the loſs in *July* 1733, was a loſs during the voyage, and according to the adventure which was agreed upon, or intended to be inſured. On a trial at *Guildhall* in the court of Common Pleas, the jury found in favour of the plaintiff.

Guilbert v. Readſhaw, Sitt. in Lond. Hil. Vac. 1781.

This was an action on a policy of inſurance on the *Nancy*, at and from *La Rochelle* to the coaſt of *Africa*, during her ſtay and trade there, and at and from thence to her port of diſcharge in the iſland of *St. Domingo*. Three days after the ſhip ſailed from *La Rochelle*, ſhe met with a gale, which ſtrained her ſeams, and ſplit her mizen-yard and rigging. The crew came in

in a body to the captain, deſiring for the preſervation of their lives to make to ſome port to repair. The veſſel being a new one, and the captain finding that ſhe had too little ballaſt, complied, and put into *Liſbon*, the neareſt port; from whence, after taking in 500 rolls of tobacco as ballaſt, he proceeded to the coaſt of *Guinea*, traded there, and the ſhip was afterwards captured in the ſight of *St. Domingo* before ſhe arrived. The defendant inſiſted, that going into *Liſbon* was a deviation, and called witneſſes, who were of opinion, that in the latitude in which the ſtorm happened, there could be no difficulty in repairing all the damage the veſſel was deſcribed to have received, even in the worſt weather, as ſhe might have proceeded to the coaſt of *Africa*, and repaired there at a leſs expence; and that a ſhip, loaded like that in queſtion, could not need additional ballaſt. On the croſs-examination, it came out that the premium would not have varied, had the voyage been by the way of *Liſbon*.

Lord *Mansfield* left it to the jury, on the ground of neceſſity to go to *Liſbon* for repairs. He ſaid, that much depended upon the circumſtance, that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witneſſes, they muſt find for the plaintiff, for that the whole of the defendant's caſe reſted merely upon ſurmiſe and ſuſpicions alone. The plaintiff accordingly had a verdict.

The next excuſe for leaving the direct courſe is ſtreſs of weather. Upon this point the rule is this, that wherever a ſhip, in order to eſcape a ſtorm, goes out of the direct courſe; or when, in the due courſe of the voyage, is driven out of it by ſtreſs of weather, this is no deviation; becauſe it was occaſioned by the act of God, which, by a maxim of law, is ſaid to work an injury to no man. It has alſo been held, that if a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven. This rule is exemplified by the following caſe.

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Hartington v. Halkeld, Sitt. in Lond. Mich. Vac. 1778.

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In an action on a policy of insurance of the ship *Atlantic*, warranted to sail with convoy from *England* to *St. Kitt's* on or before the first of *August*; the question was, whether there had been a deviation. The ship was separated from her convoy by a storm. The captain being examined, said, his object, after his separation, invariably was to gain *St. Kitt's*, or to fall in with the convoy. That the ship was taken by an *American* privateer in lat. 34. lon. 59. Several captains were examined, who swore, that they would have taken the same course to get to *St. Kitt's*, or regain the fleet.

Lord *Mansfield*.—"The single question is, whether the captain was taken as he was going to *St Kitt's*. If he was not, he is perjured. The account he gives is, that on the 28th of *July* there was a storm, which separated the fleet: that he did all he could to get to *St. Kitt's*, and to direct his course so as to meet the convoy crossing. The captain goes on the ground not to reason, but to obey, be the consequence what it might. He knows nothing of the insurance: he says to himself, If I obey, I am doing right. As to the protest, I do not see that it contradicts the captain's evidence. Other captains have looked at the log-book or journal; and they say, they would have held the same course."

Verdict for the plaintiff.

Upon the subject of a departure from the course of the voyage, on account of stress of weather, another very important point has lately been determined, though the same principle runs through all the cases, that whatever happens by the act of God, shall not be imputed to man. On this ground it has been held, that if a ship be driven out of her port of loading by stress of weather into another, and then does the best she can to get to her port of destination, it shall not be deemed a deviation, though she do not return to the port from whence she was driven.

Delaney v. Stoddart, 1 Term Rep. p. 22.

The case here alluded to was an action upon the case against the defendant, for not having insured a ship and cargo, pursuant

to

to the orders of the plaintiff, by means whereof he was damnified, the ſhip having been loſt (*a*). It was tried before Mr. Juſtice *Buller* at *Guildhall*, at the ſittings after *Trinity* Term 1785; and a verdict was found for the plaintiff.

Upon a motion for a new trial, the facts appeared to be theſe: The plaintiff, who lived at *St. Kitt's*, wrote a letter to the defendant, dated the 30th of *April* 1781, informing him that he intended to purchaſe a ſhip, and offering the defendant a ſhare.

(*a*) It may be proper to explain the nature of this action. When a man undertakes, either by an implied or expreſs promiſe, to do a thing for another, and he neglects to do it, or does it unſkilfully, the law gives the perſon injured an action for the negligence. This is the caſe in queſtion with reſpect to inſurance; and the only difference between this action, and that on a policy againſt the underwriters, is in point of form; for the plaintiff in this action is entitled to recover the exact ſum he ordered to be inſured: and the defendant is entitled to every benefit, of which the underwriter could have taken advantage, ſuch as fraud, deviation, non-compliance with warranty, &c. Wilkinſon v. Coverdale, Sittings in B. R. at Guildhall after Mich. Term, 34 Geo. III.

In a late caſe, the whole law upon this action was very fully and accurately ſtated by Mr. Juſtice *Buller*, and aſſented to by the whole Court; and upon this occaſion that learned judge mentioned the three inſtances in which ſuch an order to inſure muſt be obeyed, otherwiſe this action will lie. Firſt, where a merchant abroad has effects in the hands of his correſpondent here, he has a right to expect that he will obey an order to inſure, becauſe he is entitled to call his money out of the other's hands when and in what manner he pleaſes. The ſecond claſs of caſes is, where the merchant abroad has no effects in the hands of his correſpondent, yet if the courſe of dealing between them is ſuch, that the one has been uſed to ſend orders for inſurance, and the other to comply with them, the former has a right to expect that his orders for inſurance will ſtill be obeyed, unleſs the latter give him notice to diſcontinue that courſe of dealing. Thirdly, If the merchant abroad ſend bills of lading to his correſpondent here, he may engraft on them an order to inſure, as the implied condition, on which the bills of lading ſhall be accepted, which the other muſt obey, if he accept them, for it is one entire tranſaction. For if the commiſſion from abroad conſiſt of two parts, the one to accept the bill of lading, the other to cauſe an inſurance to be made, the correſpondent cannot accept it in part, and reject it as to the reſt. Smith v. Laſcelles, 2 Term Rep. 187.

So alſo if a merchant here accept an order for inſurance, and limit the broker to too ſmall a premium, in conſequence of which no inſurance can be procured, he is liable to make good the loſs to his correſpondent. Wallace v. Tellfair, Sitt. after Trinity 1786, before Mr. Juſtice Buller, 2 Term R. 188. note (*a*).

But if a perſon, to whom ſuch orders are ſent, does what is uſual to get the inſurance made, that is ſufficient; becauſe he is no inſurer, and is not obliged to get inſurance at all events. Thus if he ſend to *Lloyd's*, and the underwriters refuſe to take the riſk at any premium; and he afterwards ſend to get inſurance done at *Newcaſtle*, he has done his duty, and can never afterwards be charged in this action, more eſpecially if the plaintiff adopt and approve his acts. Smith v. Colegan, 2 Term R. 188. note (*a*). Niſi Prius before Mr. Juſtice Buller, Mich. 1787.

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On the 4th of *May* 1781, he wrote a ſecond letter to the defendant, acquainting him, that he had purchaſed the ſhip, but had only a ſhare in it himſelf, the reſidue being divided into three or four more ſhares, one of which he had reſerved for the defendant, in caſe he ſhould wiſh to be concerned; and directing an inſurance upon the ſhip *at and from St. Kitt's to London*, warranted to ſail with convoy. On the 28th of *June*, the defendant wrote

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to the plaintiff, that he had no objection to a fourth, or a ſhare equal to the plaintiff's. On the third of *July*, the plaintiff informed the defendant, that the ſhip had left the port to take in her cargo; that ſhe let go an anchor at *Sandy Point*, but as the wind blew freſh, *ſhe drove out, and could not come in again*; *that ſhe was obliged to go to Euſtatius*, and he therefore hoped that the defendant had not neglected to make the inſurance, for fear of accidents. The defendant, on the 19th of *July*, wrote thus to the plaintiff: "The inſurance you ordered ſhall "be done." Plaintiff again, on the 25th of *July*, wrote, *that the Friendſhip did all in her power to get up from St. Euſtatius, but could not*, and therefore he ſold her to Mr. *Roſs* at *Euſtatius*. I have already tranſcribed as much of the ſeveral letters as are material to the ſubject of this chapter; in addition to which, the following facts appeared in evidence: That the ſhip *Friendſhip* had ſailed from *St. Euſtatius*, on the 1ſt of *Auguſt* with the convoy, and that ſhe had afterwards foundered at ſea; that *St. Euſtatius* is in the direct road to *London* from *St. Kitt's*, and the convoy from *St. Kitt's* always looked into *St. Euſtatius*, to take up any ſhips that might be there; that if the *Friendſhip* had ſailed from *St. Kitt's*, ſhe muſt have gone by *Euſtatius*; but would not have ſtopped there: that when ſhe was driven to *St. Euſtatius*, *after making ſeveral efforts to get back to St. Kitt's* to finiſh her loading, and finding ſhe could not ſucceed, ſhe then took in the reſt of her loading at *St. Euſtatius*.

At the trial, ſeveral grounds of defence were made; but the only one, material for our conſideration was, that the remaining at *St. Euſtatius*, and not going back to *St. Kitt's*, was a deviation. The learned judge, who tried the cauſe, was of opinion that it was not a deviation, being occaſioned by ſtreſs of weather. Upon this ground, amongſt others, the motion for a new trial was founded.

After

After argument at the bar,

Lord *Mansfield* ſaid, "The only material queſtion is, whether there is a deviation in this caſe: and that depends on the evidence. If a ſtorm drive a ſhip out of her voyage into any port, and being there, ſhe does the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven; but here the witneſſes ſay, ſhe tried to get back to *St. Kitt's* and could not: and it is a much eaſier [306] navigation to go directly from *St. Euſtatius* to *London*, than to go back to *St. Kitt's* firſt. And as to the taking in the cargo at *St. Euſtatius*, I do not find that the ſhip loſt any time by it. Every thing is the effect of the ſtorm, and occaſioned by it. This is the only point, on which I had any doubt, and it required ſome conſideration. It was a queſtion, which was proper to be left to a jury, whether this was the ſame voyage or not, and they have determined it."

Mr. Juſtice *Willes* inclined to a different opinion.—"My only doubt is, whether it was the ſame voyage as that inſured. So far as the ſhip was driven by ſtreſs of weather, ſo far there is an exception. When ſhe is driven to *St. Euſtatius*, ſhe attempts to get back to *St. Kitt's*; but I do not find that ſhe made any attempt to get to *London* at that time. When ſhe was at *St. Euſtatius*, the owner of the ſhip ſold her to *Roſs*, who loaded her afreſh with tobacco inſtead of ſugar, which was to have been her original cargo; ſo that there is a new cargo, a new owner, and a new voyage. In theſe caſes we lean very much to deviation. In a caſe lately determined in this court, it was held, that going to *Beaumaris*, though only a few leagues out of the way, was a deviation. It ſtrikes me as a caſe of ſome difficulty: perhaps the jury had not evidence enough laid before them, on which to determine; for there is nothing ſaid on the part of the defendant as to the uſual courſe of the voyage. The riſk was certainly encreaſed by the ſhip's continuing at *St. Euſtatius* ſo long: for the inſurance, if good at all, was good all the time ſhe lay by at *St. Euſtatius*; and ſhe might have continued there much longer. In my opinion, it is very well worth the reconſideration of a jury."

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Mr. Juſtice *Aſhhurſt*.—" This ought to be conſidered as the ſame voyage inſured. Wherever a ſhip is driven by ſtreſs of weather out of her own port into another, that ſhall not be conſidered as a deviation. Here the ſhip was forced by ſtreſs of weather to go to *St. Euſtatius*; and being there, ſhe endeavoured ſeveral times to get back to *St. Kitt's*, but without effect. In fact it was better for the parties that the cargo ſhould be completed at *St. Euſtatius*; her continuing there, rather diminiſhes the riſk than otherwiſe; becauſe if ſhe had gone back to *St. Kitt's*, it would have taken up a longer
[307] time. If then every thing was done, that could be done, under ſuch circumſtances, for the benefit of the adventure, this ſhall not vacate the policy."

Mr. Juſtice *Buller*.—" It has been much relied on in this caſe, that there was a change of property; but that, in my opinion, makes no difference. Then laying that out of the queſtion, and ſuppoſing the ſhip as not being ſold to *Roſs*, I will firſt conſider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence: neither is it true, that the veſſel afterwards purſued the ſame voyage by accident; for that part of the cargo, which ſhe took in at *St. Kitt's*, continued on board of her the whole time, and the original intention of the ſhip's coming to *London* was likewiſe continued: the parties never thought of a different voyage. But it is ſaid, that ſhe took in another cargo at *St. Euſtatius*: what ſays the evidence? Where a captain has not taken in a full cargo, it is uſual to take in the reſt at *St. Euſtatius*; ſuch was proved to be the cuſtom of the voyage: and it was proved, that on a *voluntary* act of the captain's going to *St. Euſtatius*, the policy would have protected the ſhip's ſtay there; *à fortiori* it will, when the ſhip was driven there by ſtreſs of weather. As to the defendant's not being prepared at the trial to anſwer the uſage, he ought to have come prepared with that, which was the giſt of his defence. Then was the riſk altered? had it been ſo, it was in the defendant's power to have proved it: but there was no proof that it was altered; part of the ſame cargo continues; nor does it appear that they meant to alter the cargo, for ſhe endeavoured to get back to *St. Kitt's*

St. Kitt's to take in the reſt; but was prevented by ſtorms. I think the riſk would in reality have been much greater if ſhe had gone back; for ſhe muſt have come by the way of *St. Euſtatius* again in her paſſage home. The part of her cargo, which was taken in at the time the ſhip was driven from *St. Kitt's*, has already been paid for by the defendant; even this would not have been paid for by the defendant, if he had conceived that the voyage had been at an end." The learned judges therefore, except Mr. Juſtice *Willes*, after giving their opinions upon the other points in the cauſe, ordered the rule for a new trial to be diſcharged. C. H. A. P. XVII.

A deviation may alſo be juſtified, if done to avoid an enemy, or ſeek for convoy; becauſe it is in truth no deviation to go out of the courſe of a voyage, in order to avoid danger, or to obtain a protection againſt it. [308]

In an action upon a policy, which was to inſure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy; the caſe was this, the *Galley* ſet ſail from *Bremen*, under the convoy of a *Dutch* man of war to the *Elb*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an Admiral. After a ſtay of nine weeks, they ſet out from the *Texel*, and the *Galley* was ſeparated in a ſtorm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80 *l.* ſalvage. Bond v. Gonſales, 2 Salk. 445.

It was ruled by Lord Chief Juſtice *Holt*, that the voyage ought to be according to uſage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*. And the plaintiff had a verdict.

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*; and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her Gordon v. Morley, Campbell v. Bordieu, 2 Stra. 1265.

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her way thither. The inſurers inſiſted that this being the time of a *French* war, the ſhip ſhould not have ventured through the Channel, but have waited in the *Downs* for an occaſional convoy. And many merchants and office-keepers were examined to that purpoſe.

But Lord Chief Juſtice *Lee* held that the ſhip was to be conſidered as under the defendant's inſurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the inſurance from what is commonly underſtood, they ſhould have particularized her departure with convoy from the *Downs*. The juries were compoſed of merchants; and in both caſes they found for the plaintiffs upon the ſtrength of this direction.

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Cowp. Rep. 601.

In the caſe of *Bond* againſt *Nutt*, in which the material queſtion was, whether a warranty had or had not been complied with, and which conſequently will be fully ſtated in the following chapter, the point of deviation for the purpoſe of procuring convoy alſo came under the conſideration of the court. Upon that occaſion Lord *Mansfield* and the whole court held, that if a ſhip go to the uſual place of rendezvous, for the ſake of joining convoy there ready, though ſuch place be out of the direct courſe of the voyage, it is no deviation.

Enderby and another v. Fletcher, Sittings in London, Trin. Vac. 1780.

And in a more modern caſe, the only queſtion was, whether there was a deviation or not? Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the beſt of his judgment: that he had no other view or motive but to come the ſafeſt way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

In our law books we ſometimes meet with caſes, which ſay, that a deviation may be juſtified by the uſage and cuſtom of the trade. But that is not quite correct; for if by the uſage of any particular trade, it is cuſtomary to ſtop at certain places, lying out of the direct courſe from *A.* to *B.* it is not a deviation to

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ſop there; becauſe it is a part of the voyage. There is no deception upon the inſurer; becauſe he is bound to take notice of the uſages of trade; they are notorious to all the world; and when the uſage has declared it lawful in a ſpecifick voyage to go to any place, though out of the immediate track, it is as much a part of the contract of inſurance between the parties, as if it had been particularly mentioned. But in order to juſtify the captain of a ſhip in quitting the ſtraight and direct line from the port of loading to that of delivery, there muſt be a preciſe, clear, and eſtabliſhed uſage upon the ſubject, not depending merely upon one or two looſe and vague inſtances.

Where a ſhip was inſured from *Liverpool* to *Jamaica*, and had put into the *Iſle of Man*; it appeared that there were *ſome inſtances* of the *Liverpool* ſhips putting in there, but it was not the ſettled, common, eſtabliſhed, and direct uſage of the voyage and trade: it was therefore held a deviation, and the underwriters were diſcharged from any loſs that happened ſubſequent to the deviation. Saliſbury v. Townſon.

Having thus mentioned all the caſes to be found in the books of reports, which operate as an excuſe for a departure from the due courſe of the voyage, and which prevent thoſe effects, which always follow a deviation, namely, the diſcharge of the inſurer from his contract; it will be proper to obſerve, that it is not meant to inſinuate that other circumſtances may not frequently happen, which will have preciſely the ſame conſequences. For wherever a ſhip does that which is for the general benefit of all parties concerned, the act is as much within the intention and ſpirit of the policy, and conſequently as much protected by it, as if expreſſed in terms. And therefore in all caſes, in order to determine whether a diverſion from the direct courſe of the voyage is ſuch a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and conſequences of the act, as the true criterion of judgment. [310] Cowper 601.

If any of the circumſtances above ſtated do really and *bonâ fide* occur, ſo as to render a deviation abſolutely neceſſary, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and

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and in the ſhorteſt time poſſible, otherwiſe the underwriters will be diſcharged. Becauſe a voyage ſuperadded by neceſſity, ought to be ſubject to the ſame qualifications, and entitled only to the ſame ſort of latitude as the original voyage, it having become by operation of law, a part, as it were, of that original voyage.

Lavabre v. Walter. Dougl. 284.

This was laid down as law by the Court of King's Bench in a caſe, in which the voyage inſured was deſcribed in theſe words: "At and from *Port L'Orient* to *Pondicherry*, *Madras*, and "*China*, and at and from thence back to the ſhip's port, or "ports of diſcharge in *France*, with liberty to touch, in the "outward or homeward-bound voyage, at the iſles of *France* "and *Bourbon*, and at all or any other ports or places, what or "whereſoever: and it ſhall be lawful for the ſaid ſhip, *in this* "*voyage* to proceed and ſail to, and touch and ſtay at any ports "or places whatſoever, as well on this ſide, as on the other "ſide, the *Cape of Good Hope*, without being deemed a devia-"tion." The ſhip did not ſail till the 6th of *December* 1776; and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *Auguſt* following, when, inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where having paſſed the winter, and undergone very conſiderable repairs, ſhe ſailed from thence early in the year 1778, (being the ſecond ſhip that left the *Ganges*), returned to *Pondicherry*; and, after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year by the *Mentor* privateer. The uſual time, in which the direct voyage between *Pondicherry* and *Bengal* is performed, is ſix or ſeven days, but the *Carnatic* was about ſix weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, ſhe either touched at, or lay off, *Madras*, *Maſulipatam*, *Viſigapatam*, and *Yanon*, and took in goods at all thoſe places. The plaintiffs reſted their caſe chiefly on this ground, that the voyage to *Bengal* was adopted by neceſſity for the ſafety of the ſhip, upon the *bonâ fide* opinion of the captain, and the reſt of the officers, and of one *Berard* the ſupercargo, who had the principal management. To prove this neceſſity it was ſworn by *Berard* and four mates, that the

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ſhip had been detained longer in *Europe* than at firſt was foreſeen, and that ſhe met with extremely bad weather on her outward paſſage; and at *Pondicherry* was ſo leaky, that it appeared to them, that ſhe muſt be careened, which could only be done at *Bengal*, there being no other place ſo near, to which ſhe could proceed with ſafety, where that operation could be performed; for that no harbour between *Pondicherry* and the *Ganges* on the one ſide, and *Pondicherry* and *Bombay* on the other, would admit of ſo large a veſſel being hove down, her burthen being near 800 tons. Indeed it turned out when they got to *Bengal*, that ſhe could be repaired without careening: but this was only diſcovered, they ſaid, after ſhe was unloaded of much more of her contents than could have been done with ſafety in the open road of *Pondicherry*. All the witneſſes for the plaintiffs ſwore that they took the reſolution of going to *Bengal* much againſt their inclination; for that it would have been not only more for the advantage of the owners, but alſo more for their private intereſt as individuals, to go to *China*, they having prepared their own adventures for that market. Beſides the circumſtances of the leak, they aſſigned an additional reaſon for relinquiſhing the voyage to *China*, *viz.* that they had been ſo long detained at *Pondicherry*, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the *China* voyage with any degree of prudence or ſafety; and they [312] ſaid *Bengal* was the beſt place they could go to, in order to winter. The defence ſet up was; 1ſt, That the ſhip had never failed on the voyage inſured, her deſtination, *when ſhe left Europe*, having been for *Bengal*, and not for *China*. 2d, That ſuppoſing her to have ſailed on the voyage deſcribed in the policy, yet her going from *Pondicherry* to *Bengal*, inſtead of proceeding to *China*, was a deviation, and was not juſtified by neceſſity. In ſupport of the firſt ground of defence, certain ſecret inſtructions were relied upon which were found on board the ſhip, and were addreſſed by the owners at *L'Orient* to *Berard* the ſupercargo, and which, though obſcurely penned, gave great room to contend, either that, at her departure, it had been reſolved to ſubſtitute the *Bengal* for the *China* voyage, or, at leaſt, that the alternative was left with *Berard*, to be decided

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cided one way or the other, according to certain events in *India*, which events turned out in the ſort of way that, according to the inſtructions, was to determine the voyage for *Bengal*. On the ſecond ground, it was ſaid, that from the plaintiff's own witneſſes, there was no neceſſity for going to *Bengal*; and that inſtead of going directly thither, a trading voyage had been made from *Pondicherry*, which afforded a ſtrong preſumption that trading, and not the leak, or lateneſs of the ſeaſon, was the object of going to *Bengal*. On the part of the defence alſo, ſeveral letters were read (written by the owners to their correſpondents who had got their policy underwritten) to raiſe a preſumption that the neceſſity of going to *Bengal*, was merely a pretence deviſed after the capture; and when the inſured began to apprehend that the words of the policy would not cover a voyage to that place. This is the ſubſtance of the evidence given in this, and two other cauſes upon the ſame ſhip, though not on the ſame policy: in addition to which in the preſent caſe, the ſecret inſtructions given to *Berard* had been more attentively peruſed, and afforded ſtronger reaſons than they at firſt ſeemed to do, that the voyage to *Bengal* was predetermined before the departure from *L'Orient*. The plaintiff's witneſſes were much preſſed, on this occaſion, to ſay whether the lateneſs of the ſeaſon alone was ſuch as, independent of the leak, would have determined them to abandon the *China* voyage; and on the other hand, whether the leak, independent of the other reaſon, would, in their opinion, have rendered it neceſſary ſo to do. To this they ſaid, they could not give a certain anſwer; for that as neither of the caſes had happened, they had not exerciſed their judgment upon them.

Vide ante, c. 2.

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Lord *Mansfield* ſummed up very ſtrongly againſt the plaintiffs, on the head of fraud. But, independent of that ground, he ſtated a new point againſt them, namely, that if neceſſity were admitted to have been the ſole motive for ſubſtituting the voyage to *Bengal* in the place of that of *China*, *ſtill it was incumbent on the inſured to have purſued that voyage of neceſſity directly, in the ſhorteſt and moſt expeditious manner; and that the delay in going from Pondicherry to Bengal, and the repeated ſtops by touching at different places, and trading there, were deviations, and*

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not within the protection which the ſuppoſed neceſſity afforded to the direct voyage.

Notwithſtanding this direction, the jury found a verdict for the plaintiffs. Upon a motion for a new trial, after argument at the bar, the opinion of the court of King's Bench was delivered by

Lord *Mansfield*.—"If this application were made upon the ground of impeaching the teſtimony of the plaintiff's witneſſes, whatever my private ſentiments might be, after two concurrent verdicts, I ſhould not be inclined to interpoſe. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the caſe has been ill decided. The queſtion is, whether, without imputation on any body, circumſtances have not happened to take the voyage out of the policy? A deviation from neceſſity muſt be juſtified, both as to ſubſtance and manner. *Nothing more muſt be done than what the neceſſity requires.* The true objection to a deviation is not the increaſe of the riſk. If that were ſo, it would only be neceſſary to give an additional premium. It is, that the party contracting has voluntarily ſubſtituted another voyage for that which has been inſured. If the voyage to *Bengal* was unavoidable, where was the neceſſity to trade? All the ports touched at were out of the direct courſe; and ſix weeks and two months were conſumed, inſtead of ſix days. The juſtice of the caſe required a different deciſion." The rule for a new trial was accordingly made abſolute. The cauſe was again ſet down for trial; but the plaintiffs, when they were ready to be called on, ſubmitted to the opinion of the court, and abandoned their claim againſt the underwriters. [313*a*]

So alſo if a ſhip be inſured upon a trading voyage, it is incumbent on the parties aſſured, to carry on that trade with uſual and reaſonable expedition, otherwiſe their conduct will amount to a deviation, and diſcharge the policy.

Thus in an action by the aſſured againſt an underwriter on a policy of inſurance on the ſhip *Bloſſom*, at and from the coaſt of *Africa* to the *Weſt Indies*, with liberty to exchange goods and Hartley v. Buggin, B. R. Mich. 22 Geo. III.

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and ſlaves; a verdict was given for the plaintiff. But upon a rule being obtained, to ſhew cauſe why there ſhould not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points ſtarted at the trial; but the queſtion now made was, whether the plaintiff, by the uſe he made of the veſſel on the coaſt of *Africa*, and the delay he there occaſioned, was not the cauſe of the loſs; that is, whether he did not make ſuch uſe of her during her ſtay on the coaſt, contrary to the deſign of the policy, as amounted to a deviation.

It appeared in evidence, that this ſhip ſtayed on the coaſt from *Auguſt* to *March*; that ſhe was employed in receiving ſlaves on board, the produce of the cargoes of other ſhips, which were afterwards put on board other ſhips, and ſent to the *Weſt Indies*; that this is the employment of what they call a *factory ſhip*; but that a regular factory ſhip is thatched and covered, and receives the ſlaves till a ſufficient number is collected to ſend away in the veſſels; but it did not appear that any ſlaves, the produce of the *Bloſſom*'s own cargo, were ſent away in other veſſels, but that her ſtay there was ſeveral months beyond the uſual ſtay of ſhips in that trade. After argument at the bar,

Lord *Mansfield* ſaid, "When different points are agitated at a trial, and a great deal of evidence applied to each, and the counſel go out of the cauſe, it is not to be wondered at, if juries ſhould loſe their attention to the material point. The great advantage of a motion for a new trial is, that after argument on the motion, the cauſe goes down again winnowed from the chaff of the firſt trial. The ſingle point here is, whether there has not been what is equivalent to a deviation, whether the riſk has not been varied? not material whether or not the riſk has been greater. If a ſhip inſured for a trade, is turned into a floating warehouſe, or a factory ſhip, the riſk is different, it varies the ſtay, for while ſhe is uſed as a warehouſe, no cargo is bought for her. The law being clear, how is the fact? The captain ſays ſhe was not uſed as a factory ſhip, his evidence is much impeached; but he ſays he was young in the

 trade;

trade; he never ſaw a factory ſhip but once, and was not in her; he might have a ſalvo, becauſe this was not thatched; but was ſhe uſed as a thatched ſhip is uſed? It is ſaid that letters are not records; 'tis true they may be contradicted; but if they are from the parties, and are not contradicted, they are as ſtrong as any records. The fact is clear, the riſk is different in point of length, *&c.*" Rule abſolute for a new trial.

So in an action on a policy from *London* to *Port Endick*, on the coaſt of *Africa*, at ſix guineas *per cent.* on the ſhip till moored at anchor 24 hours, *and on goods till diſcharged and ſafely landed.* The ſhip arrived on the coaſt on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The barter in the trade is carried on, on board the veſſel, and the goods afterwards ſent on ſhore, in boats, and the gums brought back. In this caſe, the diſcharge of the cargo had not begun, the gums not having been brought down to the coaſt, for which purpoſe it is neceſſary to have a previous agreement with the king of the country; but no delay had been uſed. The counſel for the defendant contended, that by the cuſtom of this trade, the riſk on the goods, as well as on the ſhip, expired in 24 hours, and that the riſk on the cargo, while on the coaſt, was protected by the homeward policy, at 15 guineas *per cent.*—Lord *Kenyon* refuſed the evidence, both of the homeward policy, and of this ſuppoſed uſage, (which he had on a former occaſion admitted againſt his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the riſk, *till the goods were landed.* That if, *in landing*, any unneceſſary delay had been uſed, that might amount to ſomething in the nature of a deviation, ſo as to diſcharge the inſurer; but that did not appear to be the caſe in the preſent inſtance. Parkinſon v. Collier, Sittings in K. B. after Mich. 1797.

But though an actual deviation from the voyage inſured is thus fatal to the contract of inſurance; yet a deviation merely intended, but never carried into effect, is conſidered as no deviation, and the inſurer continues liable. This has been frequently ſo decided. Thus in the caſe of an inſurance from *Carolina* Foſter v. Wilmer, 2 Str. 1249.

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relina to *Liſbon*, and at and from thence to *Briſtol*; it appeared, that the captain had taken in ſalt, which he was to deliver at *Falmouth*, before he went to *Briſtol*; but the ſhip was taken in the direct road to both, and before ſhe came to the point, where ſhe would have turned off to *Falmouth*. It was held, that the inſurer was liable; for it is but *an intention to deviate*, and that was held not ſufficient to diſcharge the underwriter.

Ld.Ch.Juſt.Lee.

2 Stra. 1249.

In the caſe of *Carter* v. the *Royal Exchange* Aſſurance Company, where the inſurance was from *Honduras* to *London*, and a conſignment to *Amſterdam*: a loſs happened before ſhe came to the dividing point between the two voyages, for which the inſurers were held liable to pay.

Dougl. 361.

The doctrine laid down in theſe caſes has ſince been frequently recognized in ſubſequent deciſions, and particularly by Lord *Mansfield* in the caſe of *Thelluſſon* v. *Fergusſon*, which will be fully reported in the next chapter. The inſurance was from *Guadaloupe* to *Havre*, and by the depoſitions it appeared that the ſhip ſailed for *Havre*, and was always intended for *Havre*; but was directed to keep in the courſe of *Breſt* for ſafety. One of the grounds of defence was, that the ſhip never ſailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*. Lord *Mansfield*, in anſwer, ſaid, "the voyage to *Breſt* was, at moſt, but an *intended deviation*, not carried into effect."

If, however, it can be made appear by evidence, that it never was intended nor came within the contemplation of the parties to ſail upon the voyage inſured; if all the ſhip's papers and documents be made out for a different place from that deſcribed in the policy, the inſurer is diſcharged from all degree of reſponſibility, even though the loſs ſhould happen before the dividing point of the two voyages. This diſtinction was very properly taken by the court of King's Bench, in a very modern caſe: and by that diſtinction they admitted the general doctrine, with reſpect to the intention to deviate, in its fulleſt extent.

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Wooldridge v. Boydell, Dougl. 16.

The ſhip *Molly* being inſured "at and from *Maryland* to *Cadiz*," was taken in *Cheſapeak Bay*, in the way to *Europe*. Upon

Upon this the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appeared to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the *enumerated* goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, "To *Falmouth* and a market:" and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken, was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact.—At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange*'s Reports.

Lord *Mansfield*.—"The policy, on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage to *Cadiz*. All contracts of insurance must be founded on truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party, who actually deviates from the voyage described, means to give up his policy. But a devi-

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ation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo* and *ad quem*, were certain and the same. Here, was the voyage ever intended for *Cadiz?* There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. A *market* is not synonimous to *Cadiz*; that expression might have meant *Naples*, *Leghorn*, or *England*. No man, upon the instructions, would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure."

Mr. Justice *Buller*.—"I am of the same opinion, I believe the law to be according to the authorities mentioned on the part of the plaintiff: but it does not apply here. This is a question of fact. There cannot be a deviation from that, which never existed. The weight of the evidence is, that the voyage was never designed for *Cadiz*."

Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurring in the opinion delivered by Lord *Mansfield* and Mr. Justice *Buller*, the tule for a new trial was discharged.

Way v. Modigliani, 2 Term Rep. 30.

In a still later case the same doctrine was advanced, namely, that if a ship be insured from a day certain from *A.* to *B.* and before the day sail on a different voyage from that insured, the assured cannot recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

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Since the second edition of this work was published, the cases of *Wooldridge* v. *Boydell*, and *Way* v. *Modigliani*, have again come under discussion in the court of Common Pleas; and it has been held by the four judges of that court, one of whom sat in the court of King's Bench when the two cases just reported were decided, that where the *termini* of the intended voyage continue the same as those described in the policy,

licy, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate the insurance till actual deviation. The case has already been quoted for another purpose; and the facts as to this point are shortly these. The insurance was *at and from Grenada to Liverpool*; the ship sailed *from Grenada, bound for Liverpool*, but with a design *formed before the commencement of the voyage*, as appeared by the clearances, and was admitted on all sides, *to touch at Corke, in her way to Liverpool*, but was totally lost before she arrived at the dividing point. In the course of the argument a case of *Stott* v. *Vaughan*, was mentioned, as having been tried before Lord *Kenyon*, at the sittings at *Guildhall*, after Hilary Term 1794, in which his Lordship nonsuited the plaintiff, in an action on a policy on this very ship, being of opinion that the case fell within those of *Wooldridge* v. *Boydell*, and *Way* v. *Modigliani*, and that there was no inception of the voyage insured. The court of Common Pleas, however, having taken time to deliberate upon this case of *Kewley* v. *Ryan*, delivered their opinion as to the 3d question, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That, in *Wooldridge* v. *Boydell*, it appeared there was no intention that the ship should go to *Cadiz* at all, which was mentioned in the policy as her port of delivery; and in *Way* v. *Modigliani* there was an actual deviation, by the ship going to fish on the banks of *Newfoundland*: those cases therefore were wholly different from the present, for here the ship was really bound to *Liverpool*, though there were also clearances for *Corke* (*a*).

Kewley v. Ryan, 2 H Black. Rep. p. 343. See ante, p. 19.

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation, will fall upon the underwriters.

(*a*) See the case of *Middlewood* v. *Blakes*, 7 Term R. 162. where the several cases immediately preceding on the distinction between deviations intended, but not carried into effect, and non-inception of the voyage insured, are much considered.

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Thus it was held by Lord Chief Juſtice *Holt*, who ſaid, that if a policy of inſurance be made to begin from the departure of the ſhip from *England* until, &c. and after the departure a damage happens, &c. and then the ſhip *deviates*; though the policy is diſcharged from the time of the deviation, yet for the damages ſuſtained before the deviation, the inſurers ſhall make ſatisfaction to the inſured.

Green v. Young, 2 Ld. Raym. 840. 2 Salk. 444. S. C.

Subject to the rules already advanced, deviation or not is a queſtion of fact, to be decided according to the circumſtances of the caſe.

Doug. 787.

In caſes of deviation, the premium is not to be returned; becauſe the riſk being commenced, the underwriter is entitled to retain it.

Vide poſt, c. 19.

In the caſe of *Hogg* v. *Horner*, above quoted, Lord *Kenyon* being of opinion that the ſhip had deviated, it was inſiſted for the plaintiff, that as the intention to go to *Faro* (the going to which place was the deviation relied on by the defendant) had exiſted prior to the ſailing, it was a non-inception of the voyage inſured, and he had a right to the return of premium. Lord *Kenyon*, however, was of opinion that there was an inception of the riſk *at*, and the contract was entire, conſequently there could be no return of premium. But of this more will be ſaid in a ſubſequent chapter.

Ante, p. 298 *a*.

CHAPTER THE EIGHTEENTH.

Of Non-Compliance with Warranties.

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IN the two preceding chapters we have ſeen the effect, which the non-obſervance of implied conditions has upon the contract of inſurance; we ſhall now proceed to conſider the nature of warranties; their various kinds; and how far they muſt be complied with on the part of the inſured, in order to render the contract binding between the parties. A warranty in a policy of inſurance is a condition or a contingency, that a certain thing ſhall be done, or happen, and unleſs that is performed, there is no valid contract. It is perfectly immaterial for what view the warranty is introduced; or whether the party had any view at all: but being once inſerted, it becomes a binding condition on the inſured: and unleſs he can ſhew that he has literally fulfilled it, or that it was performed, the contract is the ſame, as if it had never exiſted. We have already ſeen that the breach of an implied condition is ſufficient to avoid the policy; *a fortiori*, therefore, the effect muſt be the ſame, where the condition is expreſs, and not liable to miſrepreſentation or error, becauſe it makes a part of the written contract. To ſay that the underwriter ſhould anſwer for a loſs, notwithſtanding the other party has failed in his engagements, would be to make a different rule in this ſpecies of contract, from that which ſubſiſts in every other; although this of all other contracts depends moſt upon the ſtricteſt attention to the pureſt rules of equity and good faith. Indeed the obligation to a ſtrict performance of all promiſes and conditions in every ſpecies of contract, may be deduced, as has been truly obſerved by an elegant moral writer, from the neceſſity of ſuch a conduct to the well-being, or the exiſtence of human ſociety.

1 Term Rep. p. 345.

Chap. 16, 17.

Paley's Mor. Phil.

We have ſaid that a warranty muſt be ſtrictly and *literally* performed; and therefore whether the thing, warranted to be done, be or be not eſſential to the ſecurity of the ſhip; or

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whether the loſs do or do not happen, on account of the breach of the warranty, ſtill the inſured has no remedy; becauſe he himſelf has not performed his part of the contract, and if he did not mean to perform, he ought not to have bound himſelf by ſuch a condition. And though the condition broken be not perhaps, a material one, yet the juſtice of the law is evident from this conſideration: that it is abſolutely neceſſary to have one rule of deciſion; and that it is much better to ſay, that warranties ſhall in all caſes be ſtrictly complied with, than to leave it in the breaſt of a judge or jury to ſay, that, in one caſe it ſhall, and in another it ſhall not. The very meaning of a warranty is to preclude all enquiries into the materiality, or the *ſubſtantial* performance of it: and although ſometimes partial inconveniencies may ariſe from ſuch a rule; yet upon the whole, it will certainly produce publick ſalutary effects. The inſured is bound not to draw the underwriter into error, by falſe declarations reſpecting thoſe things, about which the contract is made. *Debet præſtare rem ita eſſe ut affirmavit.*

3 Term Rep. p. 346.

Pothiér Tr. du Contrat d'Aſſurance, p. 197.

But as a warranty muſt be ſtrictly complied with in favour of the underwriter, and againſt the inſured, equal juſtice demands, and the true meaning of the contract of inſurance requires, that if a ſtrict and literal compliance with the warranty will ſupport the demand of the inſured, the deciſion ought to be in his favour, eſpecially when by ſuch a deciſion all the words in the policy will have their full operation.

In an action on a policy on goods, dated 9th *December* 1784, *loſt or not loſt, warranted well this 9th day of December* 1784: it appeared, that the warranty was at the foot of the policy; that the policy was underwritten between the hours of one and three in the afternoon of the 9th of *December*; that the ſhip was well at ſix o'clock in the morning, but was loſt at eight o'clock the ſame morning.

Blackhurſt v. Cockell, 3 Term R. 360.

Upon a motion to ſet aſide a nonſuit, which had been entered, Lord *Kenyon* Chief Juſtice, *Aſhhurſt*, *Buller*, and *Graſs*, Juſtices, were clearly of opinion, that the warranty was ſufficiently complied with, if the ſhip were well at any time that

ſay, that the nature of a warranty goes to determine the queſtion; for as it is a matter of indifference whether the thing warranted be, or be not material, and yet muſt be literally complied with; ſtill if it be complied with, that is enough: that there was good reaſon for inſerting theſe words, becauſe they protected the underwriter from loſſes before that day, to which he would otherwiſe have been liable, as the policy was on the goods from the lading: and thus too, the words *loſt or not loſt* have alſo their operation.

This being the caſe, it follows as a neceſſary conſequence, that it is very immaterial to what cauſe the non-compliance is to be attributed; for if the fact be, that the warranty was not complied with, though perhaps for the beſt reaſons, the policy has no effect. The contingency has not happened; and therefore the party intereſted has a right to ſay, that there is no contract between them. Upon this account it is, that if a ſhip be warranted to ſail on or before the 1ſt of *Auguſt*, and ſhe be prevented by any accident from ſailing till the 2d of *Auguſt*, as by the ſudden want of any neceſſary repair, or by the appearance of an enemy at the mouth of the port, the captain would do right not to ſail: but there would be an end of the policy. Cowp. 607.

In this ſtrict and literal compliance with the terms of a warranty conſiſts the difference between a warranty and a repreſentation.

Of this diſtinction ſomething was ſaid in a preceding chapter; it is ſufficient now to obſerve, that a warranty, as part of the agreement, and a condition on which it was made, muſt be *ſtrictly* complied with, whereas a repreſentation need only be performed *in ſubſtance*. In a warranty, the perſon making it takes the riſk of its truth or falſehood upon himſelf: in a repreſentation, if the inſured aſſert that to be true, which he either knows to be falſe, or about which he knows nothing, the policy is void on account of fraud. But a repreſentation, made without fraud, if not falſe in a *material* point, or if it be *ſubſtantially*, though not *literally* fulfilled, does not viſiate the policy. Vide ante, c. 10. Pawſon v. Watſon, Cowp. 787.

But

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But as repreſentations were very often made in writing, by way of inſtructions for effecting a policy, it became neceſſary to ſpecify, what written declarations ſhould be deemed warranties, and what repreſentations. It was, therefore, by ſeveral deciſions of the courts, held to be law, that in order to make written inſtructions valid and binding as a warranty, they muſt appear on the face of the inſtrument itſelf, by which the contract of inſurance is effected.

Pawſon v. Watſon, Cowp. 790.

This was declared by Lord *Mansfield* in a very particular manner in anſwer to a queſtion put to him by Mr. *Davenport* at the deſire of the underwriters, after he had delivered the opinion of the court upon a queſtion on a repreſentation.

Even though a written paper be *wrapt up in the policy*, when it is brought to the underwriters to ſubſcribe, and ſhewn to them at that time; or even though it be *wafered to the policy*, at the time of ſubſcribing; ſtill it is not in either caſe a warranty, or to be conſidered as part of the policy itſelf, but only as a repreſentation. Both theſe inſtances have occurred in cauſes before Lord *Mansfield*.

Pawſon v. Barnevelt, at Guildh. Trin. Vacat. 1779. Doug. p. 12. in the notes.

In an action on a policy of inſurance, the counſel for the defendant offered to produce witneſſes to prove, that a written memorandum incloſed was always conſidered as part of the policy. But Lord *Mansfield* ſaid, it was a mere queſtion of law, and would not hear the evidence; but decided, that a written paper did not become a ſtrict warranty, by being folded up in the policy.

Bize v. Fletcher, at Guildh. Eaſt. Vac. 1779. Doug. p. 12. in the notes.

In the other caſe it appeared, that at the time when the inſurers underwrote the policy, a ſlip of paper was wafered to it, deſcribing the ſtate of the ſhip as to repairs and ſtrength, and alſo mentioning ſeveral particulars of her intended voyage, which particulars in the event had not been complied with. Lord *Mansfield* ruled, that this was only a repreſentation; and if the jury ſhould think there was no fraud intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed, did not tend to increaſe the riſk of the underwriters, he directed them to find

find for the plaintiff, which they accordingly did. This verdict was afterwards ſet aſide upon another ground (a).

It being thus ſettled, that a warranty muſt appear on the face of the inſtrument, it ſtill became a queſtion, whether a warranty, written in the margin of the policy, was to be conſidered equally binding, and ſubject to the ſame ſtrict rule of conſtruction, as if inſerted in the body of the policy itſelf. This point came under the conſideration of the court in the caſe of *Bean* and *Stupart*, in which the material queſtion was, whether, ſuppoſing it to be a warranty, *boys* were included under the word *ſeamen*. That caſe, as far as it is material to our preſent enquiry, was as follows:

The plaintiff inſured the ſhip called the *Martha*, at and from *London* to *New York*; the voyage to commence from a day ſpecified; and in the *margin* of the policy were written theſe words, "Eight nine pounders with cloſe quarters, ſix "ſix pounders on her upper decks; thirty ſeamen beſides "paſſengers." Bean v. Stupart, Doug. 11.

Upon a motion for a new trial in this caſe, Lord *Mansfield* ſaid, there is no doubt but this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable if it were not complied with; becauſe it is a condition on which the contract is founded.

In an action on a policy of inſurance, it appeared that the following words were written tranſverſly on the margin of the policy: "In port 20th *July*, 1776." In fact, the ſhip had ſailed the 18th of *July*. The queſtion was, whether this marginal note was a warranty or a repreſentation. Kenyon v. Berthon, Mich. Vac. 1779. Doug. p. 12. note (4).

Lord *Mansfield*.—"The queſtion is, whether the ſhip's being in port on the 20th is part of the condition of the inſtrument.

(a) But if a policy of inſurance *refer* to certain printed propoſals, the propoſals will be conſidered as part of the policy. *Worſley* v. *Wood*, in error, 6 Term R. 710. See alſo *Routledge* v. *Burrell*, 2 H. Black. 254.

When

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When it is on the face of the inſtrument, it is a part of the policy; ſo that here, if the ſhip was not in port, it is no contract. As to its being only in the margin, that makes no difference: it is all part of the contract when it is *once* ſigned. And though the difference of two days may not make any material difference in the riſk, yet as the condition has not been complied with, the underwriter is not liable."

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The propriety of theſe deciſions has never been queſtioned, and the rule has been conſtantly and tacitly acquieſced in from the time in which theſe caſes were determined till the year 1786, when, notwithſtanding the uniformity of the determinations upon the ſubject, it once more became an object of diſcuſſion.

De Hahn v. Hartley, 1 Term Rep. P. 343.

It came before the court upon a ſpecial verdict: it was an action of aſſumpſit brought by the plaintiff (an underwriter) againſt the defendant, to recover back the amount of a loſs which he had paid upon a policy of inſurance. The defendant pleaded the general iſſue. The cauſe came on to be tried before Mr. Juſtice *Buller*, at *Guildhall*, when the jury found a ſpecial verdict, ſtating:

That the defendant on the 14th of *June* 1779, gave to his inſurance broker inſtructions in writing, to cauſe an inſurance to be made on a certain veſſel, called the *Juno*. (Then the inſtructions are ſet out in the verdict, ſigned by the defendant.) The verdict then ſtates that the broker, in conſequence of ſuch inſtructions, on the ſaid 14th of *June* 1779, did cauſe a policy of inſurance to be made on the *Juno*, upon goods and merchandizes laden on board, and alſo on the ſhip, at and from *Africa*, to her port or ports of diſcharge in the *Britiſh Weſt Indies*, at and after the rate of 15 *l. per cent.* The verdict, after reciting two memorandums, not material, then proceeded to ſtate, that *in the margin of the ſaid policy were written the words and figures following:* "Sailed from *Liverpool* with 14 ſix pounders, ſwivels, "ſmall arms, and 50 *hands or upwards*; copper ſheathed." That the plaintiff underwrote the policy for 200 *l.* at a premium of 31 *l.* 10 *s.* That the *Juno* ſailed from *Liverpool* on the 13th of *October* 1778, having then only 46 *hands on board her*, and arrived

arrived at *Beaumaris*, in the Iſle of *Angleſea*, in ſix hours after her ſailing from *Liverpool*, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris*, on her ſaid voyage; and that at *Beaumaris* the *Juno* took in ſix hands more, and then had, and during the ſaid voyage, until the capture thereof, continued to have 52 hands on board her. That the ſaid ſhip in the voyage from *Liverpool* to *Beaumaris*, until and when ſhe took in the ſaid ſix additional hands, was equally ſafe, as if ſhe had had 50 hands on board her for that part of the voyage. The verdict then ſtates, that the defendant was intereſted, and that the ſhip was captured: that on receiving an account of the loſs of [324] the veſſel, the plaintiff paid to the defendant the ſum of 200 *l.* not having then had any notice that the ſaid ſhip had only 46 hands on board her when ſhe ſailed from *Liverpool*.

For the defendant it was ſaid, that this repreſentation had no relation to the voyage inſured; for that was *at and from Africa*, &c. whereas this is merely an account of the ſtate of the ſhip at *Liverpool*.

Lord *Mansfield*.—"There is a material diſtinction between a warranty and a repreſentation. A repreſentation may be *equitably* and *ſubſtantially* anſwered; but a warranty muſt be *ſtrictly* complied with. Suppoſing a warranty to ſail on the 1ſt of *Auguſt*, and the ſhip did not ſail till the 2d, the warranty would not be complied with. A warranty in a policy of inſurance, is a condition or a contingency, and unleſs that is performed there is no contract. It is perfectly immaterial, for what purpoſe a warranty is introduced; but being inſerted, the contract does not exiſt unleſs it is literally complied with. Now in the preſent caſe, the condition was, the ſailing of the ſhip with a certain number of men, which not being complied with, the policy is of no effect."

Mr. Juſtice *Aſhhurſt*.—"The very meaning of a warranty is, to preclude all queſtions whether it has *been ſubſtantially* complied with: it muſt be *literally* ſo."

Mr. Juſtice *Buller*.—"It is impoſſible to divide the words written in the margin, in the manner which has been attempted at the bar; that that part which relates to the copper ſheathing

ſhould

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should be a warranty, and not the remaining part. But the whole forms one entire contract, and muſt be complied with throughout." Judgment for the plaintiff. A writ of error was brought in the Exchequer Chamber upon this judgment, which, after two arguments, was affirmed by the unanimous opinion of the eight judges, compoſing that Court. *Michaelmas* Term 1787, 28 *Geo.* 3.

Having ſtated thoſe rules, which apply to warranties in general, it will now be proper to conſider the ſeveral kinds of warranties, and thoſe principles which are peculiar to each ſpecies, confirmed by deciſions of the courts. It would be endleſs to enumerate the various warranties that are to be found in policies; becauſe they muſt frequently, and for the moſt part do depend upon the particular circumſtances of each caſe; ſuch as the number of men, of guns, being copper ſheathed, *&c.* But thoſe which moſt frequently occur in our books of reports, and upon which the greateſt queſtions have ariſen, may be reduced to three claſſes: Warranty as to the time of ſailing; warranty as to convoy; and warranty of neutrality. Of each of theſe we ſhall treat; obſerving in the firſt place, that thoſe rules which are applicable to warranty in general, muſt neceſſarily alſo apply to each of theſe individually.

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Roccus Not. 38.

1ſt, As to the time of ſailing. In moſt voyages, the time at which they are to commence is a material circumſtance; becauſe in every country there are ſome ſeaſons when navigation is much more dangerous than at others, owing to periodical winds, monſoons, and various other cauſes. Indeed, we have ſeen, that a man having once warranted to ſail on a particular day, whether the riſk be, in fact, materially altered or not by a breach of that warranty, the underwriter is no longer anſwerable. But this ſtrict adherence to the very day ſpecified, muſt have ariſen from the principles juſt ſtated: for if a latitude of one day were given, why not extend it farther? It has therefore been held, that when a ſhip has been warranted to ſail on a particular day, though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force; the warranty has not been complied with, and the inſurer is diſcharged from his contract.

Kenyon v. Berthon. Supra.

Thus

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Thus, in an action on a policy of inſurance, upon a motion to ſet aſide the verdict which had been given for the plaintiff, the caſe appeared to be this. The declaration ſtated, that a policy was made on the ſhip *New Weſtmorland*, at and from *Jamaica* to *London*, *warranted to ſail on or before the 26th of July* 1776, free from capture, and free from all reſtraints and detainments of kings, princes, and people of what nation, condition, or quality ſoever. It further ſtated, that the ſaid ſhip was preparing and ready to ſail, and would have ſailed on the 25th of *July*, on her intended voyage, *if ſhe had not been reſtrained by the order and command of Sir Baſil Keith*, the then governor of *Jamaica*, and *detained beyond the day:* that ſhe afterwards ſailed and was captured. For the plaintiff it was ſaid, that the uſual clauſe againſt the detention of rulers and princes being inſerted in this policy, the embargo, by which the ſhip was prevented from ſailing on the day mentioned in the warranty, came expreſsly within the meaning of it, and therefore excuſed the delay.

Hore v. Whitmore, Cowp. 784.

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On the other hand it was ſaid, that the loſs of the ſhip could in no poſſible reſpect be connected with the embargo. That the warranty was *poſitive and expreſs*; that the ſhip ſhould depart on or before the day appointed, and therefore muſt be complied with. Of this opinion was the court; and accordingly the rule to ſet aſide the verdict for the plaintiff, and to enter a nonſuit was made abſolute.

But the neceſſity of a punctual adherence to the day on which the ſhip is warranted to ſail by the policy, is not peculiar to the law of *England*; for we find that foreign writers declare, that the ſame rule is univerſally adopted. If, ſay they, the owner of the ſhip or goods has ſaid in the policy, that he will be ready to ſail at a particular time, at which, perhaps, the navigation may be leſs dangerous; and on this account the inſurer is more eaſily induced to underwrite the policy; and he afterwards delay the time of ſailing, and the ſhip and goods periſh, the underwriter is not bound, for he who neglects to depart at the appointed time, muſt, if he ſail at a ſubſequent period, do it entirely at his own riſk (*a*).

Roccus Not. 38.

(*a*) Roccus, in this paſſage, quotes the work of Santerna, upon inſurances, who, he obſerves, *exclamat contra magiſtros navium, et nautas, quando detinentur in portu a mulierculis, vel dulcedine uxi.*

If

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If the warranty be to ſail *after* a ſpecific day, and the ſhip ſail before, the policy is equally avoided as in the former caſe; becauſe the terms of the warranty are as much departed from in the one caſe as in the other.

Vezian v. Grant, bef. Mr. Juſt. Buller, Guildhall, Eaſt. Vac. 1779.

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On the 8th of *December* 1777, a policy was underwritten by the defendant on goods in a *French* ſhip, *Le Comte de Trebon*, "at and from *Martinico* to *Havre de Grace*, with liberty to "touch at *Guadaloupe*; *warranted to ſail after the 12th of* "*January*, and on or before the firſt of *Auguſt* 1778." The inſurance was made by the plaintiff on account of *Jacques Horteloupe* and *Louis Delamare*, of *Havre de Grace*, owners of the ſhip and cargo; at which time it was not known whether ſhe would load at *Martinico* or *Guadaloupe*, they having goods to come from both places; the policy was therefore intended to cover the riſk from both, or either of them. The ſhip, having finiſhed her outward voyage at *Martinico*, *ſailed from thence on the 6th of November* 1777, for *Guadaloupe*, where ſhe took in her whole loading, without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe*; from whence ſhe ſailed on the 26th of *June* 1778, and was taken on the 3d of *September*. The plaintiff demanded payment of the loſs from the underwriters, which being refuſed, he brought actions againſt them for the recovery thereof. This cauſe came on to be tried at *Guildhall*, before Mr. Juſtice *Buller*, when the defendant's objections were, that, according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of ſailing was not complied with, *the ſhip having ſailed from Martinico before the 12th of January* 1778, to wit, on the 6th of *November* 1777. The jury, under the direction of the learned judge, were of that opinion, and accordingly found a verdict for the defendant.

But when a ſhip is warranted to ſail on or before a particular day, if ſhe ſailed from her port of loading, *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the ſame iſland, merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo beyond the day. The ground is, that

that when a ſhip leaves her port of loading, when ſhe has a full and complete cargo on board, and has no other object in view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port. If, indeed, her cargo was not complete, it would not have been a commencement of the voyage. It is true, in the caſe about to be reported, Lord *Mansfield* was of a different opinion at the trial; and it certainly was a caſe of conſiderable difficulty: but when it came again before the court, it underwent a great deal of diſcuſſion, and after long and mature deliberation of all the judges, his lordſhip candidly acknowledged that his former [328] deciſion was wrong; and upon a ſubſequent occaſion, he declared he was completely convinced, that the voyage commenced from the port of loading. As that is the leading caſe upon this ſubject, it is here reported at length.

Bond v. Nutt, Cowp. 601.

This was an action on a policy of inſurance upon the ſhip *Cadel* in the *Weſt India* trade, loſt or not loſt, *at and from* Jamaica *to* London; *warranted to have ſailed on or before the 1ſt of* Auguſt 1776. The policy was effected on the 20th of *Auguſt* 1776, at a premium of 15 guineas *per cent.* to return 5 *per cent.* if the ſhip departed with convoy; and 8 *per cent.* if with convoy for the voyage, and arrived ſafe. At the trial, there was no controverſy about the facts; and they are ſhortly theſe: the ſhip was completely laden for her voyage to *England*, at *St. Anne*'s in *Jamaica*; *and ſailed from* St. Anne's Bay, *on the 26th of* July *for* Bluefields, *in order to join the convoy there*, *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* ſtation, like *Spithead* in *England*, and where a convoy then lay, which was expected to ſail for *England* every day: but the greater part of the way from *St Anne*'s to *Bluefields*, is out of the direct courſe of the voyage from *St. Anne*'s to *England*. That ſhe arrived off *Bluefields* on the 28th or 29th of *July*, where ſhe was immediately ſtopped by an embargo laid on all veſſels being in any part of *Jamaica*, and was detained there till the 6th of *Auguſt*, when ſhe ſailed with the convoy for *England*; but afterwards, being ſeparated in the paſſage, was taken by an *American* privateer. Upon theſe facts the jury found a verdict for the defendant. When this caſe was firſt argued at the bar,

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two points were relied upon for the defendant, in ſupport of the verdict, which the jury had given in his favour: 1ſt, That the departure from *St. Anne's*, was not a departure from *Jamaica*, within the meaning of this policy. 2d, If it were, that the going to *Bluefields* was a deviation. Upon the firſt argument, Lord *Mansfield* ſaid: One point now ſtarted is entirely new: that ſuppoſing the voyage to have begun from *St. Anne's*, that going to *Bluefields* (which, it is admitted on all hands, was out of the courſe of the voyage) though for the purpoſe of convoy only, ſhall be conſidered as a deviation. In anſwer, it has been ſaid by the counſel for the plaintiff, that there are caſes in which the contrary has been held: but they are not cited. I could wiſh therefore that theſe caſes might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.

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Vide the preceding chapter.

The ſecond point was again argued; and then the judges ſeverally mentioned their ideas upon the ſubject, without coming at that time to any deciſion.

Lord *Mansfield*.—"I am extremely glad this motion has been made; the cauſe came on at *Guildhall*, by the candour of the parties in the faireſt manner. But I had no intimation of its being a cauſe of conſequence till after the verdict; when I was informed 100,000 *l.* depended upon it. The queſtion was fairly tried, and the caſe has been very well argued on both ſides. I have thought much of it ſince the trial. Some things are clear, and there are others which require conſideration. The policy was made on the 20th of *Auguſt* 1776, upon the contingency of a fact, which muſt have exiſted one way or the other at the time the policy was underwritten. That contingency was, that the ſhip ſhould have ſailed on or before the 1ſt of *Auguſt*: conſequently it muſt have taken place or not upon the 20th of that month. The port, from whence the ſhip was to be inſured, was, if I may uſe the expreſſion, the whole iſland of *Jamaica*: but from which of the ports the ſhip would ſail, neither party knew: therefore they have uſed the words, "at and from *Ja-*"*maica*:" by force of which ſhe certainly was protected in going

going from port to port, and till ſhe ſailed. It follows, that the word *ſailed* in the warranty, muſt mean that ſhe had ſailed *on her homeward-bound voyage*. The queſtion then is a matter of fact; and one that admits of no latitude, no equity of conſtruction, or excuſe. Had ſhe or had ſhe not failed on or before that day? That is the queſtion. No matter what cauſe prevented her; if the fact is, that ſhe had not failed, though ſhe ſtaid behind for the beſt reaſons, the policy was void: the contingency had not happened; and the party intereſted had a right to ſay, there was no contract between them. Therefore what was ſaid in argument is very true: if ſhe had been prevented by any accident from ſailing till the ſecond of *Auguſt*, as by the ſudden want of any neceſſary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to ſail, but there would have been an end of the policy. [330] It is very different from the caſes where a voyage has been begun: there the uſage of the voyage may juſtify going a little out of the direct courſe. This alſo is clear; if the ſhip had broken ground, and been fairly under ſail upon her voyage for *England* on the 1ſt of *Auguſt*, though ſhe had gone ever ſo little a way, and had afterwards put back from the ſtreſs of weather, or apprehenſion from an enemy in ſight, or had then been put under an embargo, and had been detained till *September*, it would ſtill have been a *beginning* to ſail; and the ſtoppage would have come too late: becauſe the warranty was upon a fact antecedent. Such a caſe happened before me a day or two after the preſent action was tried. It was an inſurance upon a ſhip from *Grenada* to *London*, *warranted to ſail on or before the 1ſt of Auguſt*. She had barely begun to ſail on the day, when ſhe was ſtopped by an embargo, and detained beyond the time. I thought the voyage was begun: the jury were of that opinion: and there has been no motion for a new trial. I am giving no opinion, only breaking the caſe. Here the whole queſtion turns upon this: did the voyage from *Jamaica* homeward begin from *St. Anne's*, or from *Bluefields*? Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reaſonable, and for the benefit of all parties: but ſtill it does not vary the fact of ſailing. Here it was very reaſonable: but the queſtion, whether the voyage began from *St. Anne's* or

Thelluſſon v. Ferguſſon, at Guildhall, Hil. Vac. 1777.

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Bluefields, ſtill remains. Another material circumſtance ariſes from the words, " at and from *Jamaica*." At the trial, I reaſoned thus: " By the terms of the policy ſhe was protected " during her ſtay at *Jamaica*: by force of them, ſhe had a " right to go to any port, or all round the iſland; and ſhe went " to *Bluefields* for reaſons beſt known to herſelf. Therefore " the voyage began from *Bluefields*." Had the inſurance been at and from the port of *St. Anne*'s, it did ſtrike me, that going round the iſland to *Bluefields*, would have been a deviation. But this is a queſtion of ſo much value and conſequence, that the court wiſhes to conſider the caſe thoroughly, before they give a final deciſion upon it."

Mr. Juſtice *Aſton*.—" I ſhall be very glad to conſider this caſe. As at preſent adviſed, it ſeems to me to depend upon a mere matter of fact: and therefore to be very different from
[331] the caſes of deviation that have been put. In them, the change of voyage, being from neceſſity, is excuſed in point of law: but here, the whole queſtion is, did the *Capel* ſail from *Jamaica* on or before the 1ſt of *Auguſt*, according to the true ſenſe and meaning of the policy. If ſhe had fairly commenced her voyage, on her departure from *St. Anne*'s, and the going to *Bluefields* is to be taken as the uſage of the voyage, I ſhould think the underwriters would be liable. So, if ſhe had broken ground for the voyage, and had gone but a league, and been blown back again. But if ſhe had found no convoy at *Bluefields*, ſhe could not have ſtaid there to wait for convoy: that would have vacated the policy. So, if her going to *Bluefields* is to be conſidered only as a continuation of her ſtay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne*'s to depart for the voyage: and ſhe went to *Bluefields*, not to take in part of her cargo, (for then it would clearly not have been a commencement of the voyage), but from a juſt motive. Whether that was or was not a commencement of the voyage, is clearly a matter of fact; and in this caſe a very material one; therefore ought to be very fully conſidered."

Mr. Juſtice *Willes*.—" This is clearly a matter of fact. I think if the ſhip upon her arrival at *Bluefields* had found no convoy,

convoy, ſhe could not have ſtaid there; but muſt have ſailed immediately: or if ſhe had met with convoy, and had ſtaid an unreaſonable time for other ſhips, the inſurers would not have been liable." CHAP. XVIII.

After theſe opinions, which evidently lean in ſupport of the verdict, had been delivered, the court took further time to deliberate; and then their unanimous opinion was pronounced by

Lord *Mansfield*.—"We are all ſatisfied that the truth of the caſe is, that the voyage from *Jamaica* to *England* began from *St. Anne*'s. That when the ſhip ſailed from *St. Anne*'s, ſhe had no view or object whatſoever, but to make the beſt of her way to *England*. That the value of this queſtion, admitted on both ſides, ſhews, that every other ſhip under the ſame circumſtances looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the ſafeſt courſe of navigation from *Jamaica* to *England*; and that it would have been unwiſe and imprudent for any ſhip not to have touched there. The great diſtinction is this: that ſhe ſailed from *St. Anne*'s for *England by way of Bluefields*; and that it was not a voyage from *St. Anne*'s to *Bluefields* with any object or view diſtinct from the voyage to *England*. If ſhe had gone firſt to *Bluefields* for any purpoſe independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from *St. Anne*'s to *Bluefields*; and another from *Bluefields* to *England*. But here, under all the circumſtances, we think ſhe had no other object than to come directly to *England* by the ſafeſt courſe." Therefore the rule for a new trial was made abſolute. [332]

A few years afterwards a ſimilar deciſion was made; and the only difference between the caſes was this, that in the caſe now to be mentioned, it was a condition inſerted in one of her clearances, that ſhe ſhould paſs *by the place* (at which ſhe was detained by the governor beyond the day named in the warranty)

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ranty) to take the orders of government. But this was not thought ſufficient to induce the court to depart from the deciſion in *Bond* and *Nutt*; eſpecially as in this caſe, the place where the ſhip was detained was in the direct courſe of the voyage.

Thelluſſon v. Ferguſſon, Doug. 361.

It was an action on a policy of inſurance on the *French* ſhip *L'aimable Gertrude*, "at and from *Guadaloupe* to *Havre*, "*warranted to ſail on or before the 31ſt of December.*" It was tried before Lord *Mansfield*, when a verdict was found for the plaintiff. A motion having been made for a new trial, the caſe from his Lordſhip's report appeared to be as follows: *The ſhip took in her complete lading and proviſions for France, and all her clearances and papers*, at a port, called *Pointe a Pitre*, in the iſland of *Guadaloupe*, and *ſailed from thence on the 24th of October*, for *Baſſeterre*, where there is no port, but only an open road. The town of *Baſſeterre* is the reſidence of the *French* governor. The ſhip arrived there at night, when the captain went on ſhore, and next day waited on the governor, who would not permit him to depart, and to prevent it, took
[333] his ſhip's papers from him. At this place he was detained with his ſhip till the 10th of *January*, when he ſet ſail with a convoy, which had arrived ſome little time before, and being ſeparated after ſome days from the convoy, the ſhip was taken by an *Engliſh* veſſel. The captain, who was the only witneſs produced at the trial, ſwore, that notice had been given on the part of the governor, ſome days before he ſailed, to him and the other captains of ſhips at *Pointe a Pitre*, who were preparing to ſail for *Europe*, that a convoy was expected to be at *Baſſeterre* from *Martinico*, on the 25th of *October*, and that, in conſequence of this intimation, he had worked night and day to get ready, and had paid extraordinary gratifications to obtain the ſhip's papers and clearances as ſoon as poſſible; that the deſire of being in time for the convoy was the only reaſon for this haſte; and that, although he was not able to ſail till the 24th, he was ſtill in hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* ſome days beyond its time. The laſt ſhip papers, which he received at *Pointe a Pitre*, was *Le Rolc d'equipage*,

or the muſter roll. This paper, which was much relied upon by the counſel for the defendant, was dated the 24th of *October*, and was in the following words: "Vu par nous, chargé du "detail des claſſes au department de La Grande terre *Guada-* "*loupe*, l'equipage denommé au role des autres parts au nom- "bre de vingt perſonnes, le capitaine compris. Permis au "Sieur *Jean Jacques Lethuillier* commandant le navire *L'ai-* "*mable Gertrude* du *Hœvre*, de s'en ſervir pour faire ſon re- "tour, au dit lieu, *paſſant a la Baſſeterre pour y prendre les or-* "*dres du gouvernement* en obſervant les ordonnances et regle- "mens de la marine." Under this there was written, on the ſame paper, an account, dated the 30th of *October*, of ſome changes in the number of the crew, and under that, the following entry: "Vu par nous, ecrivain de la marine chargé "du detail des claſſes, les vingt cinq perſonnes exiſtantes au "preſent rôle, le capitaine compris. Il eſt permis au Sieur *Le-* "*thuillier* commandant le navire *L'aimable Gertrude*, du *Hœvre*, "de faire ſon retour au dit lieu en ſe conformant aux ordon- "nances et reglemens royaux de la marine. A *Baſſeterre* "*Guadaloupe*, le 2 *Janvier*, 1779." On another paper, called Le Congé, dated the 16th of *October*, which was read on the part of the plaintiff, there was written, at the bottom, as follows: "Vu de relache a la *Baſſeterre Guadaloupe*, pour y "attendre un convoi pour *France*. Ce 28 *October*, 1778, "*Monentheill*." The captain ſwore that he underſtood the only reaſons for the condition in the muſter roll, that he ſhould go to *Baſſeterre*, were, the convoy was to be at that place, and that he might take ſuch diſpatches as were ready for *Europe*. He had not objected to it; becauſe in the regular courſe of his voyage to *France* from *Pointe a Pitre*, he muſt have gone that way, cloſe under the guns of *Baſſeterre*, in order to avoid *Monſerrat*, there being no other road, except they were to keep quite to the leeward, which is not the cuſtom. If he had arrived there in the day-time, he would not have caſt anchor, but would have ſent his boat for the diſpatches; but having arrived at night, his ſhip had been detained, contrary to his intention and expectation. The defendant's counſel, to invalidate the captain's teſtimony, beſides the muſter roll, and the entry under it, as above ſtated, read the proteſt made by

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the captain on his arrival at *Dover*; and alſo his depoſition in anſwer to the 29th interrogatory in the proceedings in the Admiralty on the condemnation of the ſhip. The words of the proteſt, on which they relied, were as follows: "Whereupon he (the captain) waited on the proper officer at *Pointe a Pitre* for his muſter roll, and was by him informed, it could not be granted, but on condition that he ſhould firſt ſail to *Baſſeterre*, and *there wait* the directions of the general of the iſland." And in a ſubſequent part, "Whereupon at his (the captain's) inſtance, the ſaid *John Nicholas Lethuillier*, his father came to *Baſſeterre*, and went with Meſſrs. *Gobert* and *Boteul*, commiſſioners of commerce, to the ſuperintendant, and alſo to the general of the iſland, ſtating to them that the ſaid ſhip and cargo were inſured upon condition that ſhe ſhould have departed from the iſland of *Guadaloupe* before the 31ſt of *December*, the terms of which inſurance they judged it eſſential to fulfil, notwithſtanding which they were ſtill refuſed permiſſion to depart, and were kept there until after the 31ſt of *December*." The depoſition relied on was as follows: "At the time the ſhip was firſt purſued and taken, ſhe was ſteering her courſe towards *Breſt*. Her courſe was not altered upon the appearance of the veſſel, [335] by which ſhe was taken. Her courſe was at all times, when the weather would permit, directed to *Breſt*, for which port ſhe was directed to ſail, although the deſtination was for *Havre de Grace*, by the ſhip's papers. She was not, before nor at the time of the capture, *ſailing beyond or wide of Havre de Grace*. She was then about eight leagues weſt of *Uſhant*, and her courſe was not altered to any other port or place, but was obliged to be directed to *Breſt*, in conſequence of the orders he had received, ſubſequent to the delivery of the ſhip's papers." In anſwer to the 27th interrogatory, his depoſition was, "That all the ſhip's papers found on board were true and fair, and none of them falſe and colourable." At the trial the captain ſwore, that he had received directions to keep in the courſe to *Breſt* at *Baſſeterre* from his father, who had formerly commanded the ſhip; *but this was done as the ſafeſt way, in time of war, of getting to Havre, which ſtill continued to be the place of the ſhip's deſtination.*

deſtination. Upon this evidence, the defendant's counſel made two objections, as grounds for a new trial: 1ſt, That there had been no inception of the voyage on the 24th of *October*, nor till after the 31ſt of *December*: 2dly, That the ſhip never ſailed on the voyage inſured, *viz.* from *Guadaloupe* to *Hævre*, but on a voyage from *Guadaloupe* to *Breſt*. After both theſe points had been fully argued at the bar,

As to the 2d point vide ante, c. 17. p. 314.

Lord *Mansfield* ſaid:—"In my apprehenſion, there is no contradiction between the parole evidence, and the proteſt and depoſitions. This captain had never heard of the caſe of *Bond* and *Nutt*. Under an inſurance at ſuch a place as *Guadaloupe* or *Jamaica*, the ſhip is protected in going from port to port in the iſland. But the queſtion here is, whether the voyage was *bonâ fide* commenced; and ſtopt by accident. As to the condition about taking the orders of government, the ſhip could not ſail from any part of the iſland without the governor's leave. But the captain, when he left *Pointe a Pitre*, expected to meet a convoy at *Baſſeterre*, and to proceed immediately without interruption. A convoy had been publiſhed, and he certainly would have gone to *Baſſeterre* at any rate, independent of the clauſe in the muſter roll. With regard to the ſecond point, the voyage to *Breſt*, was, at moſt, but an intended deviation, not carried into effect."

Vide c. 17.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred. [336]

Mr. Juſtice *Buller*.—"The caſe in 1777 between the ſame parties is in point. There was no embargo there, nor in the preſent caſe, when the ſhip ſailed. There muſt be a lawful *bonâ fide* ſailing, which I think there was in this caſe. The ſhip was completely ready in all reſpects." The rule for a new trial was, therefore, diſcharged.

See Lord Manſfield's opinion in the cauſe of Bond v. Nutt, where he quotes the caſe alluded to.

Notwithſtanding the uniformity of deciſion in all theſe caſes, the judgment given in the laſt cauſe was not ſatisfactory to about twenty other underwriters upon the ſame policy, nineteen of whom obtained leave to conſolidate their different cauſes upon the uſual terms, in order to bring the queſtion once more into court. Accordingly, in the enſuing ſittings, the cauſe was ſet down for trial,

See the Introduction for the Hiſtory of the Conſolidating Rule.

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Thelluſſon v. Staples, Sittings at Guildhall, Eaſt. Vac. 1780.

In this cauſe, the ſecond point as to the deviation was abandoned; and on the firſt, the ſame evidence was given as upon the former occaſion. The point was again fully argued for the defendant.

Lord *Mansfield*.—"The ſingle queſtion on this policy is, whether the ſhip ſailed on her voyage to *Havre* before the 31ſt of *December*. She certainly ſailed from *Pointe a Pitre* completely loaded before that time. The doubt on the firſt queſtion of this ſort was this: the policy was "at and from *Jamaica*;" now the word *at* certainly comprizes the whole iſland, and, under that word, you may ſail from one port to another everywhere along the coaſt of the iſland. The ſhip, therefore, in that ſenſe, was ſtill at *Jamaica*, after ſhe had got to *Bluefields*. She did not leave *Bluefields* till after the day named in the warranty, and that place was quite out of the courſe of navigation from *St. Anne*'s to *England*. I own, at the trial, I thought the voyage to *England* did not commence till the ſhip ſailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wiſhed (as I always do in ſuch caſes) that the opinion of the court might be taken in order to ſettle the point. The caſe, when it came on in court, was very ably argued; I was completely convinced, and the court were unanimouſly of opinion, that the voyage to *England* began when the ſhip ſailed from *St. Anne*'s; and upon the ſecond trial, the plaintiff had a verdict. *Earle* and *Harris* was ſtill a ſtronger caſe. *There* an embargo was actually publiſhed, before the ſhip ſailed, and the captain, immediately after croſſing the bar, returned to make a proteſt, and ſent his ſhip knowingly into the embargo: but he ſwore that he expected the embargo was to be taken off, and that he ſhould proceed immediately upon his voyage; and the jury believed him. In this caſe to go by ſteps. There was public notification of a convoy to be at *Baſſeterre* on the 25th of *October*. The captain thought that it might be ſtopped a day or two at *Martinico*, and that he ſhould get to *Baſſeterre* in time. He worked night and day, paid double fees for his papers, and ſailed with full expectations of purſuing his voyage directly. He knew of no embargo, and *Baſſeterre* was directly in his road. In that reſpect, this caſe differs ſtrongly from *Bond* v. *Nutt*. He

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Earle v. Harris, at Guildhall, Hil. Vac. 1780.

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was even in the regular voyage obliged to paſs under the cannon of *Baſſeterre*. He had his muſter-roll, on condition of calling there; but he made no difficulty of taking it on that condition, becauſe he knew he muſt paſs that way at all events. Did he not *bonâ fide* begin his voyage? He certainly had no idea, when he ſailed from *Pointe a Pitre*, of meeting with any ſtop. So it was in the former caſe of *Thelluſſon* v. *Ferguſſon*. There was no idea of the embargo in that caſe, when the ſhip ſailed. Here there is not the leaſt ſuſpicion of fraud. This captain certainly did not know of the deciſion in *Bond* v. *Nutt*. He thought, when he was detained at *Baſſeterre* beyond the 31ſt of *December*, that the policy was forfeited, which is a ſtrong circumſtance in the plaintiff's favour, for it ſhews that the ſailing was not colourable. This queſtion has undergone the conſideration of a ſpecial jury and of the court. Underwriters have a right to litigate queſtions, which ſeem to them to be in their favour. But, at laſt, there ſhould be an end of litigation. If you ſhould be of the ſame opinion with the former jury and the court, you will find for the plaintiff:" which they did accordingly. The cauſe of the twentieth underwriter, on the ſame policy, who refuſed to conſolidate, ſtood next in the paper for trial; but upon the above verdict being given, his counſel contented that a verdict ſhould alſo be entered againſt him.

The Grenada Caſe. Vide ſupra.

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From this long train of uniform and conſiſtent determinations, it ſhould ſeem that the queſtion, what ſhall or ſhall not be a departure within the meaning of the warranty is now completely ſettled. In inſurances *at and from London*, warranted to depart on or before a particular day, it has long been a queſtion, what ſhall be a departure from the port of *London*; or rather what is the port of *London*: and it is ſingular, that this point has never yet been judicially determined. On the one hand it is ſaid, that the moment a ſhip is cleared out at the cuſtom-houſe, and has all her cargo on board, if ſhe quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other ſide it is contended, and with great appearance of reaſon, that a ſhip is not ready for ſea, till ſhe has got her cuſtom-houſe cocket on board,

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board, which is the final clearance, and which ſhe cannot have till ſhe arrive at *Graveſend*: that till this cocket is received, the ſhip dare not proceed to ſea under a penalty, and till then is not entitled to the drawbacks, and that *Graveſend* is always conſidered as the limits of the port of *London*, and unleſs the ſhip ſailed from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited.

Rogers v. Royal Exchange Aſſu. Comp. Sittings in C. P. after Mich. 1787, before Lord Loughborough.

In a late caſe, the Royal Exchange Aſſurance Company reſiſted a demand made upon them, in order to try this great queſtion: but as it appeared from the evidence of the log-book that the ſhip did not in truth break ground till after the day named in the warranty, the plaintiff was nonſuited; and the queſtion remains undecided.

Poſtlethw. Dict. tit. Convoy.

The ſecond ſpecies of warranty, which moſt frequently occurs in inſurances, is that of ſailing under the protection of convoy; that is, certain ſhips of force, appointed by government, in time of war, to ſail with merchantmen from their port of diſcharge to the place of their deſtination. When the nature of a convoy is conſidered, it is highly reaſonable, that the policy ſhould be forfeited, if the inſured fail to comply with ſo material a condition; becauſe the riſk, which the underwriter takes upon himſelf, is very conſiderably increaſed, in time of war, by the want of convoy. Accordingly, by the laws of this, and of all other maritime powers, if the inſured warrant that the veſſel ſhall depart with convoy, and it do not; the policy is defeated, and the underwriter is not reſponſible. We have already ſeen, that every warranty muſt be ſtrictly and literally complied with; and that a liberal and ſubſtantial performance merely will not be ſufficient. Hence in a warranty to ſail with *convoy*, it becomes material to conſider, what ſhall be deemed *a convoy* within ſuch a condition. Upon this point, it has been ſolemnly ſettled by the court of King's Bench, Mr. Juſtice *Willes* excepted, who differed from the other learned judges upon that occaſion, that it is not every ſingle man of war, which chuſes to take a merchant ſhip under its protection, that will conſtitute ſuch a convoy as a warranty means;

1 Emerigon, Traité des Aſſurances, p. 164.

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means; *but it muſt be a naval force under the command of a perſon appointed by the government of the country to which they belong.* The reaſon of ſuch a deciſion is wiſe; becauſe government muſt be ſuppoſed to be better informed of the deſigns and ſtrength of the enemy, and what degree of force will be ſufficient to repel their attempts. In the caſe, in which theſe points were ſettled, it alſo became a queſtion, how far ſailing orders from the commander in chief to the particular ſhip or ſhips, were requiſite to the conſtitution of a convoy. But it was not thought neceſſary to decide that point, although it ſeemed to be the opinion of the majority of the judges, that they were not abſolutely eſſential.

Hibbert v. Pigou, B. R. Eaſter, 23 Geo. III. 1783.

This caſe came before the court upon a rule to ſhew cauſe why the verdict, which the defendant had obtained, ſhould not be ſet aſide, and a new trial had. It was an action upon a policy of inſurance on the ſhip *Arundel*, captain *Mann*, at and from *Jamaica* to *London*, *warranted to depart with convoy*. The inſurance was at 18 guineas *per cent.* to return 3 *per cent.* if the ſhip ſailed on or before the firſt of *Auguſt*. The facts appearing on the report of Lord *Mansfield*, who tried the cauſe, are theſe: On the 25th of *July* the *Arundel* ſailed from *Morant* harbour to *Kingſton*, where ſhe met the *Glorieux* man of war, Captain *Cadogan*, who was likewiſe on his way to join Admiral *Graves* at *Blueſields*. Lord *Rodney* had appointed Admiral *Graves* to rendezvous at *Blueſields*, in order to take the fleet of merchant ſhips, which were to ſail from thence upon the firſt of *Auguſt*, under his command, and to convoy them to *Great Britain*. Captain *Mann*, upon their meeting in *Kingſton* harbour, aſked for ſailing orders from Captain *Cadogan*, who ſaid, he had none, not having himſelf at that time joined the Admiral: but he was ſure that Admiral *Graves* would not ſail from *Blueſields* till the *Glorieux* joined him. However, if he ſhould have ſailed, he, Captain *Cadogan*, would give Captain *Mann* ſailing orders, and take every care of the *Arundel* in his power. They proceeded together, and arrived at *Blueſields* on the 28th of *July*; but they found that Admiral *Graves* had ſailed two days before. The *Glorieux* and *Arundel* then ſailed from *Blueſields*, the former firing guns, giving ſignals, and behaving in every reſpect *like a convoy*.

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convoy. Upon the fifth of *Auguſt* a ſignal was made, that the fleet was in ſight; and on the ſeventh they joined the fleet off *Cape Anthonio*. The *Arundel* was afterwards loſt in *September*, in a dreadful ſtorm, which diſperſed the whole fleet, and in which a vaſt number of the ſhips periſhed. Upon this evidence, the jury were of opinion, under the direction of the Chief Juſtice, that the terms of the warranty had not been performed, and they therefore found a verdict for the underwriters, the defendants. After this queſtion had been fully argued at the bar, the three judges, Mr. Juſtice *Aſhhurſt* being, at that time, one of the Lords Commiſſioners of the Great Seal, delivered their opinions ſeverally.

Lord *Mansfield*.—"Though the underwriters and inſured are equally innocent; yet I cannot help ſaying, that now, as well as at the trial, my inclination led me to wiſh, that the plaintiffs were in the right. But the more it is argued, it is the leſs liable to diſpute. There are hypothetical contracts and conditional contracts. In the former, the contract depends upon an event taking place; there is no latitude; no equity; the only queſtion is, has that event happened. But conditional contracts admit of a more liberal conſtruction. Now the only queſtion upon this contract is, whether this ſhip has departed with convoy? A great deal muſt be referred to the uſage of merchants. The government appoints a convoy for the trade, and alſo names a place of rendezvous. Then comes the reference to the uſage of merchants; the voyage is begun at *Kingſton*; but the riſk only commences at *Blueſields*. Now though Lord *Rodney* deſires the captain of the *Glorieux* to take any ſhips he may pick up in his way, and convoy them to *Blueſields*; yet the warranty in the policy by the uſage, does not require convoy to *Blueſields*. The ſecond reference to the uſage of merchants is, what is eſteemed a convoy by merchants.

[341] *A convoy is a naval force, under the command of that perſon, whom government has appointed*. They truſt to the knowledge of government, which muſt be ſuppoſed to be better acquainted with the plans and force of the enemy, and with the ſtrength neceſſary to repel their attempts. Now this is the general uſage, to which matters of this kind are referred. Then let

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us ſee what the caſe is here.—Lord *Rodney* appoints Admiral *Graves* to go with ten ſail of the line to *Bluefields*; and from thence to convoy the *Jamaica* trade to *Great Britain*. When they come to the place of rendezvous, they take ſailing orders from the Admiral, *which are eſſential to convoy*, as by them they know the ſignals, for what places they are to ſteer, in caſe of diſperſion by ſtorm, or any other juſt cauſe (*a*). Admiral *Graves*, on the 26th of *July*, for reaſons beſt known to himſelf, thinks he has got all the ſhips, for which he ought to ſtay, and proceeds on his voyage. He leaves no order for the *Glorieux* to follow him to *Cape Anthonio*; and though it is very true, that it is in the power of the Commander in Chief to change the place of rendezvous, yet in this caſe it is not true, as was ſuppoſed in argument, that *Cape Anthonio* was appointed. At the time of ſailing from *Bluefields*, the *Glorieux* was no part of the convoy; for ſhe did not come there till two days after the fleet was gone. Upon theſe facts it did appear to me, and to the jury at the trial, that the warranty was not complied with: I continue of the ſame opinion now; and that this rule ſhould be diſcharged."

Mr. Juſtice *Willes*.—"I cannot perfectly coincide with every thing which Lord *Mansfield* has laid down. The form of the contract is in general words, "*to depart with convoy*," without mentioning any particular day, or pointing out any ſpecifick convoy. The terms of the policy ſeem to me to have been literally and ſubſtantially complied with; for there was no *laches* on the part of the *Arundel*; ſhe came with all poſſible expedition, and was at *Bluefields* two days before the time appointed for ſailing. When captain *Mann* found that the fleet

(*a*) Since the two former editions of this work, I have met with a caſe of *Veedon* v. *Wilmot*, at *Guildhall*, *July* 1744, in the time of Lord Chief Juſtice *Lee*, where the ſhip inſured had departed from *London*, and arrived at the *Downs* 22d *Auguſt*, where the *Grafton* and *Lenox* (the convoy) were under ſail, and the captain ſent one of his men on board for ſailing orders, which were refuſed; but the Commodore ſaid, "*keep on, and I will take care of you*;" and the ſhip being loſt that night by ſtriking on the ſhore, the queſtion was, if the ſhip was put under convoy, *having no ſailing orders*. And it was held ſhe was, and the plaintiff had a verdict. *Note to the third edition.*

See poſt, 342 *a*.

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was gone, he did every thing in his power for the ſecurity of the ſhip; for he put himſelf under the protection of the *Glorieux*, which was appointed by Lord *Rodney* to make a part of the convoy: and it appears in evidence, that in every reſpect Captain *Cadogan* behaved as a convoy. I have ſearched a good deal for caſes; and I can only find one in *Strange* 1250, upon the ſubject of ſailing orders; and I do not think that caſe goes ſo far as to ſay, that ſailing orders are eſſential to a convoy. The loſs of the *Arundel* happened long ſubſequent to her joining the fleet; and I am therefore of opinion, that the warranty in this policy has been ſubſtantially performed."

[342] Vide poſt, c. 348.

Mr. Juſtice *Buller*.—"In deciding this caſe, it is not neceſſary to ſay, whether ſailing orders are eſſential or not: as at preſent adviſed, I do not ſay that they are abſolutely neceſſary. The preſent queſtion is ſimply this: did the *Arundel* ſail with convoy? This is a condition which muſt be literally complied with, as all the caſes agree. As to the queſtion itſelf, it is undoubtedly a queſtion of fact: and the facts of the caſe ſeem to me to prove, that the *Glorieux* was no part of the convoy. Admiral *Graves* had ſailed before they arrived; and that circumſtance, which my Lord ſtated, ſeems very material, that no orders were left behind for the *Glorieux*. I ſay that, on this evidence, ſhe was not a part of the convoy: for in order to make her ſo, it muſt appear that ſhe was under the orders of *Graves*. Did he leave her behind to take care of the ſhips that remained? If ſo, it would alter the caſe very materially. But there was no ſuch idea; for if there had, the *Glorieux* would have remained at *Bluefields* for the reſt of the ſhips, until the 1ſt of *Auguſt*: on the contrary, Captain *Cadogan*, finding that Admiral *Graves* was gone, immediately followed; for his ſole object was to join Admiral *Graves*. *Ships muſt ſail under the convoy appointed by the government of the country*, who proportion the ſtrength of it to the neceſſity of the times. To what end would this care be taken, if merchantmen were to ſail under the protection of ſingle ſhips, with which they may happen to meet? I am therefore of opinion, that if a ſhip do not ſail with the convoy appointed by government,

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it is not a ſailing with convoy, within the terms of the policy." The rule for a new trial was therefore diſcharged (*a*).

This queſtion reſpecting the neceſſity of having ſailing inſtructions from the commander of the convoy came on to be conſidered in the Court of Common Pleas, upon a motion for a new trial, when Mr. Juſtice *Buller*, in the abſence of Lord Chief Juſtice *Eyre* ſaid; "Had not my Lord mentioned that the verdict was entirely to his ſatisfaction, I ſhould not decide upon this application in the firſt inſtance. The caſe is here brought to a queſtion of law. *In point of law then, the general propoſition is, that ſailing inſtructions are neceſſary.* I have never decided this caſe myſelf, but it has often been determined at *Guildhall*. I do not ſay that there may not be caſes in which they may be diſpenſed with. In *Hibbert* v. *Pigou* my expreſſion is, "It is not neceſſary to ſay, whether ſailing orders are eſſential or not; as at preſent adviſed, I do not ſay that they are abſolutely neceſſary." The caſe of *Victoria* v. *Cleeve* goes no further. If the captain from any misfortune, from ſtreſs of weather, or other circumſtances be abſolutely prevented from obtaining his inſtructions, ſtill it is a departure with convoy: but then he muſt take the earlieſt opportunity to obtain them. Generally ſpeaking, unleſs ſailing inſtructions are obtained, the warranty is not complied with: the captain cannot anſwer ſignals; he does not know the place of rendezvous in caſe of a ſtorm; he does not in effect put himſelf under the protection of the convoy, and therefore the underwriters are not benefited." The other judges concurred in this opinion.

Webb v. Thomſon, 1 Boſ. and Pull. 5.

See poſt, 348.

In a ſtill later caſe, in an action on a policy of inſurance on the ſhip *Potomack*, at and from *Jamaica* to *London*, warranted to depart with convoy from the place of rendezvous on or before the 1ſt of *Auguſt* 1795: it was admitted that the veſſel never had got ſo near to the admiral, who had in fact left the

France v Kirwan, Sittings at Guildhall after Mich. 38 Geo. 3.

(*a*) Another action was brought upon the ſame policy againſt another of the underwriters; and altho' a verdict in that caſe was found for the plaintiffs; yet it ſeems to me to leave the doctrines above advanced unſhaken: for upon the ſecond trial it was proved, beyond all doubt, that the Glorieux was in truth a part of the convoy, a fact, which was left doubtful on the firſt; and it was upon that fact that Lord Mansfield and Mr. Juſtice Buller chiefly relied.

Sittings at Guildhall before Mr. Juſtice Buller after Eaſter Term 1784.

 place

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place of rendezvous before the *Potomack* arrived there, as to obtain ſailing orders, when he loſt ſight of the convoy, and was afterwards taken. The plaintiff's object was to get a deciſion upon the point, *how far ſailing inſtructions were eſſential to the ſailing with convoy.*

Lord *Kenyon* expreſſed the ſtrong inclination of his opinion to be, that they were eſſential, but would not decide it, as this veſſel had never *in fact* joined. The plaintiffs were nonſuited.

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Although the deciſions of the courts of Common Law require no additional authority to ſupport them; yet it will be proper, merely by way of illuſtration, to point out to the reader, in what caſes the opinions of foreign writers agree with the determinations of the *Engliſh* courts of juſtice. Monſieur *D'Emerigon*, a very diſtinguiſhed *French* writer upon this branch of juriſprudence, puts this caſe: "On avoit fait des aſ-
"ſurances ſur un navire, de ſortie de *Marſeille* juſq'aux De-
"troits de *Gibraltar*, et dans la police il étoit dit que le na-
"vire partiroit de *Marſeille ſous l'eſcorte d'un batiment de roi*;
"*autrement, aſſurance nulle.* Une fregate, chargée de muni-
"tions de guerre pour *Algeſiras*, ſe trouvoit à *l'Eſtaque*. Le
"navire aſſuré mit à la voile ſous les auſpices de cette fre-
"gate qui lui accorda protection, et qui partit en meme
"temps. Conſulté ſur ce cas, je fus d'avis que ſi le navire
"étoit pris par les ennemis, les aſſureurs ſeroient fondés à
"refuſer le payment de la perte: *car autre choſe eſt d'etre ſous*
"*l'eſcorte du'n batiment de roi, et autre choſe eſt de naviguer*
"*ſimplement ſous ſes auſpices.*"

a Emerigon, p. 171.

See the caſe.

From the caſe of *Hibbert* and *Pigou* we collect this; that a convoy appointed by the Admiral commanding in chief upon a ſtation abroad, is a convoy appointed by government. And beſides the inſtruction it affords, applicable to the particular ſubject, for which it was here inſerted, it ſerves to eſtabliſh ſome principles laid down at the beginning of this chapter; that whether the loſs do or do not happen, on account of the breach of the warranty, ſtill the policy is forfeited: for in that caſe, the ſhip inſured periſhed in a ſtorm, long after ſhe had joined

joined the regular convoy; and consequently the loss did not happen, on account of the breach of the condition. CHAP. XVIII.

Having seen what shall be deemed a convoy, let us proceed to consider what shall be a *departure* with convoy, within the meaning of a warranty *to depart with convoy*. The rule on this point is short and clear, that such a warranty implies, that the ship shall go with convoy from the usual place of rendezvous, at which the ships have been accustomed to assemble; as *Spithead*, or the *Downs*, for the port of *London*; and *Bluefields* for all the ports in *Jamaica*. And from the particular port to such usual place of convoy, the ship is protected by the policy.

Thus in an action on a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, *warranted to depart with convoy*; the declaration states, that the ship went from *London* to the *Downs*, *and from thence with convoy*, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, to which it was objected, That here was a departure without convoy. [344] Lethulier's Case, 2 Salk. 443.

The clause, warranted to depart with convoy, must be construed according to the usage among merchants, that is, from such place, where convoys are to be had, as the *Downs*, &c. Per Curiam.

It is true, Lord Chief Justice *Holt*, upon that occasion, was of a different opinion; but the judgment of the other judges was relied upon, and confirmed in the following case by Lord Chief Justice *Lee*, and has also been recognized in several other cases, in which the question has come collaterally before the court. Indeed of late years, it has been tacitly acquiesced in; for there never is a convoy from the port of *London*.

On an insurance from *London* to *Gibraltar*, *warranted to depart with convoy*, it appeared that there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was Gordon v. Morley, 2 Sua. 1205.

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taken in her way thither. The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the *Channel*, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose. But Lord Chief Justice *Lee* held, that the ship was to be considered as under the defendant's insurance *to a place of general rendezvous*, according to the interpretation of the words, "warranted to depart with "convoy." *Salk.* 443. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The jury was composed of merchants, who found for the plaintiff, upon the strength of this direction.

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A similar decision was made in the year 1781, by the Admi-
Tom. 1. p. 166. ralty of *France*, which is reported in the work of *Emerigon*.

Upon this kind of warranty, it is to be observed, that although the words commonly used are, "to *depart* with con-
3 Salk. 443. "voy," or, "to sail with convoy;" yet they extend to sailing with convoy throughout the whole of the voyage, as much as if those words were inserted. Indeed to suppose the contrary would introduce an infinite variety of frauds; as a ship would sail out of harbour with the convoy, continue with it for an hour or two, then leave it, and run every peril, at the risk of the underwriter. If, therefore, the convoy is only to go a part of the way, that is not a compliance with the warranty; and the insurer is discharged from his engagements.

3 Levinz. 320. This was one of the points ruled in *Jeffreys* v. *Legendre*, that will be quoted at length presently, in which Lord Chief Justice *Holt* and the rest of the court held, that although the words of the policy only were "to depart with convoy," yet they extend to sail with convoy throughout the whole voyage.

In a more modern case, however, this doctrine came again in question; and after very full consideration, the opinion of Lord *Holt* was unanimously confirmed by the whole court of King's Bench.

It

Lilly v. Ewer, Doug. 72.

It was an action for money had and received, brought againſt an underwriter for a return of premium. The policy was on the ſhip the *Parker Galley*, "at and from *Venice* to "the *Currant Iſlands*, and at and from thence to *London*," at a premium of five guineas *per cent.* "to return 2 *per cent. if the* "*ſhip ſailed with convoy from Gibraltar*, and arrived." The ſhip touched at *Gibraltar* on her way home, and ſailed from thence under convoy of the *Zephyr* ſloop of war, *but the convoy was deſtined only to go to a certain latitude, about as far as Cape Finiſterre*, being ordered on the *Liſbon* ſtation; and accordingly the ſhip and convoy ſeparated, and the ſhip arrived ſafe at *London*. The only queſtion in the cauſe was, whether, by the terms of the policy, the condition for the return of premium was a *departure from Gibraltar with ſuch convoy as could be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for the voyage*. The trial came on before Lord *Mansfield* and a common jury, when a verdict was found for the plaintiffs.

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A rule having been obtained to ſhew cauſe why there ſhould not be a new trial; the evidence from his Lordſhip's report appeared to be thus: That the plaintiffs had called witneſſes (one of whom was Mr. *Gorman*, an eminent merchant) to prove that for ſome years paſt, when convoy *for the voyage*, or *the whole voyage* was intended, thoſe explanatory words had been added, and that, by this uſage, the expreſſions of "*ſailing* "*with convoy*," and "ſailing with convoy for the voyage," had received diſtinct technical meanings: "with convoy," ſignifying whatever convoy the ſhip ſhould depart with, whether for a greater or leſs part of the voyage. Several policies were alſo produced, which had been filled up at the office of the ſame broker, who had prepared that which had given occaſion to this cauſe, in which the words, "for the voyage," or "for "*England*," were added. The captain proved, that at the time when he left *Gibraltar*, no other convoy was to be had. The witneſſes for the defendant ſwore, that they underſtood the words "with convoy," to mean, *convoy for the voyage*; and the broker ſaid, that, at the time this policy was ſigned, he underſtood and apprehended it was ſo underſtood by all the parties, that the convoy was to be for the voyage, and that

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the return was such as was usual, when convoy for the voyage was meant. His Lordship, after stating the evidence, said, that when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the counsel to ask the opinion of the witnesses on the construction; but to learn whether there was any usage in this case, which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury.

The case was fully argued at the bar.

Lord *Mansfield*.—"On the words I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy, which might be designed to separate from the ship in a minute or two; though when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident, to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy should continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause; because the sense contended for by the plaintiffs, was not inconsistent with the words of the policy, and therefore it was material to see what the usage was. I laid great stress on Mr. *Gorman*'s testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that people in the city are dissatisfied with the verdict, and think the evidence of the plaintiff's witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms. It may be hard, because words have been added in some instances, to force a construction in this case, from the omission of them. The question is of great importance."—The rule was therefore made absolute.

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Doug, p. 74. note (7).

The new trial came on before Lord *Mansfield* at the sittings after *Trinity* term, 19 *Geo.* 3. when the verdict was found for the defendant, the insurer.

But

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But although it has been thus ſettled, that a ſhip muſt depart with convoy for the whole of the voyage; yet in the laſt caſe, it was truly ſaid by Lord *Mansfield*, that an unforeſeen ſeparation is an accident, to which the underwriter is liable. It is the law of reaſon and common ſenſe; for it would be the height of injuſtice and cruelty to heap misfortune upon misfortune, and to ſay, that becauſe a ſhip has been ſeparated from her convoy by ſtreſs of weather, or the fury of the elements, (perils inſured againſt by the policy), that the inſured ſhall ſuffer ſtill greater miſery, by being deprived of that indemnity which he had ſecured to himſelf by paying a ſufficient and adequate premium. The law of *England* does not tolerate ſuch principles; and the firſt deciſion upon the ſubject was ſuch, that it never has been departed from in any inſtance.

Doug. 73. 1 Emerigon, 166.

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Aſſumpſit on a policy of inſurance made in the uſual form, "from *London* to *Cadiz*, warranted to depart with convoy." Upon the general iſſue pleaded, the jury found a ſpecial verdict, ſtating, that the ſhip did depart from the port of *London*, in company of the convoy intended, and ſailed together as far as the *Iſle of Wight*, in purſuance of the voyage towards *Cadiz*; and there they were ſeparated by ſtreſs of weather; that the convoy put into *Torbay*, and the inſured ſhip into the port of *Fowey* in *Cornwall*. That three days afterwards, the wind ſetting right to bring the convoy down the channel, the maſter of the inſured ſhip ſailed out of *Fowey* on purpoſe to meet the convoy; but it did not come: and then the inſured ſhip was ſeized with another ſtorm, ſo that ſhe could not return from whence ſhe came, but was driven upon the *French* coaſt, and there taken by the enemy.

Jeffery v. Legendra, 3 Lev. 320. 2 Salk. 443. Carth 216. 1 Shower, 320. 4 Mod. 58. S.C.

After ſeveral arguments of this ſpecial verdict, the plaintiff had judgment *per totam curiam*; and their principal reaſon was, becauſe there was no manner of neglect, or other default found in the maſter of the ſhip; but it appeared he had done all in his power to keep in company of the convoy. It is found expreſsly, that he departed with convoy from his firſt port, which anſwers the words of the policy: but it would have been

Carthew, 216.

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been otherwiſe, if any fraud or neglect had been found in the maſter of the inſured ſhip after his departure, notwithſtanding he departed out of the firſt port with convoy; for the meaning of the words "*warranted to depart with convoy*" is, that the inſured ſhip ſhould keep company with the convoy, during the whole voyage, if poſſible.

As to this point ſee the caſes ante, p 339. et ſeq. and probably ſome doubt may ariſe as to the following caſe.

Even where the ſhip has by tempeſtuous weather been prevented from joining the convoy at all, at leaſt, of receiving the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy, within the terms of the warranty.

Victoria v. Cleeve, 2 Stra. 1250.

The plaintiff had inſured on goods in the *John* and *Jane*, from *Gottenburgh* to *London*, with a warranty *to depart with convoy* from *Fleckery*. In *July* 1744, the ſhip ſailed from *Gottenburgh* to *Fleckery*, and there ſhe waited for convoy two months. On the 21ſt of *September*, at nine in the morning, three men of war, who had one hundred merchant ſhips in convoy, ſtood off *Fleckery*, and made a ſignal for the ſhips there to come out, and likewiſe ſent in a yaul to order them out. There were fourteen ſhips waiting, and the *John* and *Jane* got out by twelve o'clock, and one of the firſt; the convoy having ſailed gently on, and being two leagues a-head. It was a hard gale, and by ſix in the afternoon, the ſhip came up with the fleet; but could not get to either of the men of war for ſailing orders, on account of the gale of wind. It was ſtormy all night, and at day-break the ſhip in queſtion was in the midſt of the fleet; but the weather was ſo bad, that no boat could be ſent for ſailing orders. A *French* privateeer had ſailed amongſt them all night; and it being foggy on the 22d, attacked the *John* and *Jane* about two, who kept a running fight till dark, which was renewed the next morning, when ſhe was taken. For the defendant it was inſiſted, that this ſhip was never under convoy, nor is ever conſidered ſo, till they have received ſailing orders; and if the weather would not permit the captain to get them, he ſhould have gone back.

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Sir William Lee.

But the Chief Juſtice and the jury were both of opinion, that as the captain had done every thing in his power, it was a departing

parting with convoy: and those agreements are never confined to precise words; as in the case of departing with convoy from *London*, when the place of rendezvous is *Spithead*, a loss in going thither is within the policy. So the plaintiff recovered.

But it is evident from all that has been said, that if there be an opportunity of convoy; if the convoy throw out repeated signals to join; and by the negligence and delay of the captain of the insured ship, the opportunity be lost, the warranty to depart with convoy is not complied with, and the underwriter is discharged.

Thus in an action on a policy of insurance tried before Lord *Mansfield*, the plaintiff was nonsuited, there being a warranty to depart with convoy; and it appearing from the evidence, that the commodore of the convoy had made signals for sailing from *Spithead* to *St. Helens* the night before, and had made repeated signals the next morning from seven o'clock till twelve, notwithstanding which, the ship insured had neglected to sail with him, and did not sail till two hours after, in consequence of which he was taken by a privateer (*a*).

Taylor v. Woodness, Sittings at Guildhall, Hill. Vac. 4 Geo. 3.

Although we have thus seen, that a ship must not voluntarily depart from convoy during the voyage (*b*), yet this species of warranty must always be construed with reference to the usage of trade, and to the orders of government. For if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or if government appoint a convoy to escort the trade of a place to a given latitude and no farther; and there be no other convoy on that station, a vessel, taking the advantage of such a convoy, has complied with the warranty to sail with convoy for the voyage.

Thus in an insurance on the ship William, "*at and from London to Jamaica*," *warranted to depart with convoy for the*

Smith v. Readshaw, London, Sittings after East. 1781.

(*a*) As to the duty of the officers appointed for convoy to merchant ships, see it prescribed in the stat. of the 13 Ch. 2. stat. 1. c. 9. art. 17. which regulations were confirmed by the 22d of Geo. 2. c. 33. s. 2. art. 17.

(*b*) This is now prohibited by statute. See post, p. 349 *b*.

voyage,

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voyage, Lord *Mansfield*, in the courſe of his ſumming up to the jury, ſaid, "A warranty to ſail with convoy means with ſuch "a convoy as government pleaſes to appoint; and whether "it conſiſts of ſeparate ſhips at different ſtations or not, it is "a convoy for the voyage; therefore on that point there is "no doubt."

De Garay v. Chaggett, London, Sittings after Mich. 1795.

The ſame doctrine was held by Lord *Kenyon*, in an action on a policy of inſurance *at and from Cadiz to Amſterdam, warranted to ſail with convoy for the voyage*. The ſhips inſured had ſailed from *Cadiz* under a *Britiſh* convoy; and were loſt before they reached the *Downs*, where it was alleged they were to have taken a freſh convoy for *Amſterdam*. The underwriters inſiſted that the convoy ſhould have been direct to *Amſterdam*. The aſſured, on the other hand, contended, that [349 *a*] all convoy muſt be according to uſage, and that in many voyages there is no ſuch thing as a direct convoy, but that the veſſels proceed by relays of convoy from ſtage to ſtage. The ſpecial jury, with Lord *Kenyon*'s approbation, gave a verdict for the plaintiffs. And although in that caſe, it is true, the underwriter had adjuſted the policy *with full knowledge* of all the circumſtances, which his lordſhip ſeemed to think concluſive, yet there were other cauſes on the ſame policy, where there was no adjuſtment; and upon Lord *Kenyon* and the jury declaring that, without conſidering the adjuſtment, they thought the warranty had been complied with, the plaintiff had a verdict, and no motion was ever made for a new trial in any of theſe cauſes.

D'Eguino v. Bewicke, 2 H. Black. 554.

So alſo the court of Common Pleas decided in an action on a policy on the ſhip *Little Betſey*, at and from *London* to *St. Sebaſtian*, *warranted to ſail with convoy*. The ſhip ſailed with other veſſels under convoy of ſeveral ſhips of war: and after a certain latitude, the *Weazel*, one of the men of war, was detached to convoy the *Spaniſh* ſhips; but the captain of that ſhip had orders to go with the *St. Sebaſtian* ſhips no further than *Bilboa*, and in fact he went no farther. A verdict paſſed for the plaintiff. When the caſe came on before the court on a motion for a new trial, it was argued for the underwriters, that warranties

warranties are to be ſtrictly complied with; and that however near the port of *St. Sebaſtian* might be to *Bilboa*, yet the principle was the ſame; and that a convoy to the latter place could no more be conſtrued to be a convoy to the former, than a convoy to the *Cape of Good Hope* could be a convoy to the *Eaſt Indies*, and for this was cited *Hibbert* v. *Pigou* (ſupra 339).

Mr. Juſtice *Buller*.—"The caſe of *Hibbert* and *Pigou* is not applicable to this, for there a convoy was appointed and actually ſailed from *Jamaica* to *England*; as to the inſtance put at the bar of convoy to the *Cape of Good Hope*, I entirely differ from the counſel on that point; for if government thought a convoy to the *Cape* was a ſufficient protection to the *Eaſt India* trade, and the uſuge were for the *Eaſt India* ſhips to ſail with a convoy only to the Cape, and to conſider that as the *Eaſt India* convoy, and no other convoy was appointed to the *Eaſt Indies*, I ſhould hold that the warranty was complied with; though I agree if there was another convoy to the *Eaſt Indies*, it would be otherwiſe. The captain of a merchant ſhip has [299*b*] nothing to do with, nor can he know the inſtructions from the Admiralty to the king's officers, but muſt take ſuch convoy as he finds. I am therefore of opinion that there is no ground at all for this motion."

Mr. Juſtice *Heath*.—"I am of the ſame opinion. The owner of a ſhip, when he makes an inſurance, cannot know the orders of the Admiralty reſpecting convoys."

Mr. Juſtice *Rooke*.—"The ground ſtated at the bar ſeems to me to be more fit for the jury than the court, and the jury have found that the convoy was ſufficient."

Lord Chief Juſtice *Eyre*.—"I am ſatisfied with the finding of the jury."

The rule for a new trial was therefore refuſed.

The ſailing with convoy has added ſo much to the ſecurity of our commerce in time of war, that in the year 1798, an act of

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of parliament paſſed for the purpoſe of compelling ſhips to ſail with convoy, and by which alſo a conſiderable revenue was intended to be raiſed.

38 Geo. 3. c. 76.

Sect. 1. The firſt ſection of this act provides that it ſhall not be lawful for any ſhip or veſſel belonging to any of his majeſty's ſubjects (except as therein-after is excepted) to ſail or depart from any port or place whatever, unleſs under the convoy and protection of ſuch ſhip or ſhips as may be appointed for the purpoſe.

Sect. 2. That the maſter or other perſon having the charge or command of every ſuch ſhip or veſſel, which ſhall ſail or depart under the protection of convoy, ſhall and is thereby required to uſe his utmoſt endeavours to continue with ſuch convoy during the whole of the voyage, or during ſuch part thereof as ſuch convoy ſhall be directed to accompany and protect ſuch ſhip, and ſhall not wilfully ſeparate or depart therefrom upon any pretence whatever, without order or leave for that purpoſe from the officer having the command of ſuch convoy.

Sect. 3. It is alſo enacted that if the maſter or commander of any ſhip which is by this act required not to ſail without convoy, ſhall ſail without convoy; or having ſailed with convoy ſhall wilfully depart therefrom, without leave firſt obtained from the perſon entruſted with the charge of ſuch convoy, every ſuch maſter ſhall forfeit 1000 *l.* and in caſe the whole or any part of the cargo conſiſted of naval or military ſtores, the penalty is 1500 *l.* with a power in the court, where the action may happen to be brought, to mitigate the penalties, ſo as they are not reduced to a leſs ſum than 50 *l.*

Sect. 4. By ſection the fourth, it is provided that in caſe of a ſailing without, or a wilful deſertion of, convoy, every inſurance or contract or agreement for any inſurance upon ſuch ſhip, or goods, wares or merchandize laden thereon, or upon any property, freight, or other intereſt ariſing out of the ſame, whereon inſurances may lawfully be made, (and which ſhall be the property of the maſter or commander of the ſhip, ſo ſail-

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ing without convoy, or wilfully quitting the ſame, or of any perſon intereſted in ſuch veſſel or cargo, who ſhall have directed or been any way privy to, or inſtrumental in cauſing ſuch ſhip or veſſel to ſail without convoy, or wilfully to ſeparate therefrom), ſhall be null and void, to all intents and purpoſes both at law and in equity, any contract or agreement to the contrary notwithſtanding; and that nothing ſhall be recovered thereon by the aſſured for loſs or damage, or for the premium, or conſideration in nature of a premium, which ſhall have been given for ſuch inſurance: and if any party to ſuch inſurance, or any broker or other perſon ſhall tranſact a ſettlement on ſuch inſurance, or allow any money in account, on ſuch inſurance, every ſuch perſon ſhall forfeit 200*l.* CHAP. XVIII.

It is alſo provided, that the officers of the cuſtoms ſhall not permit veſſels to clear outwards, till they have given bond, with one ſurety, in the penalty of the value of the ſhip, with condition that the ſhip ſhall not ſail without, nor wilfully deſert the convoy. Sect. 5.

By the ſixth ſection, this act is not to extend to veſſels, not required to be regiſtered by any acts then in force; nor to any ſhip, having a licence ſigned by the Lords of the Admiralty to ſail without convoy, or by ſuch perſons as ſhall be duly authorized by them for that purpoſe; or to any ſhip proceeding with due diligence to join convoy from the port or place at which the ſame ſhall be cleared outwards, in caſe ſuch convoy ſhall be appointed to ſail from ſome other port or place, except as to the bond hereby required to be taken upon the clearance outwards; or to any ſhip bound to or from any port in *Ireland*; or to ſhips bound from one port to another in *Great Britain*; nor to ſhips in the ſervice of the *Eaſt India*, or *Hudſon's Bay*, companies. Sect. 6. 28 June 1798.

By the eighth ſection, the act is not to extend to ſhips ſailing from foreign ports, in caſe no convoy is appointed by the Lords of the Admiralty of *England*, or perſons authorized by them at ſuch foreign ports to appoint convoys, or to grant licences for ſailing without convoy. Sect. 8.

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Sect. 9. The Lords of the Admiralty are to give notice in the Gazette that maſters of ſhips ſhall have on board, flags and vanes for the purpoſe of diſtinction, and of anſwering ſignals; and without having which they are not to be cleared outwards.

Sect. 10. So much of the act of the 33 *Geo.* 3. ch. 66. ſec. 8. as makes the maſters of ſhips under convoy liable to be articled in the Court of Admiralty for diſobeying ſignals or other lawful commands of the commodore, or deſerting convoy, and finable at the diſcretion of the ſaid court, in any ſum not exceeding 500 *l.* and puniſhable by impriſonment, not exceeding one year, ſhall be painted on a board, and affixed on ſome conſpicuous and convenient part of every ſhip which by this act is required not to ſail or depart without convoy; and that in default thereof every maſter or other perſon, having the charge or command of any ſuch ſhip, ſhall forfeit, for every ſuch offence, the ſum of 50 *l.*

Sect. 11. The eleventh ſection directs, that if any ſhip, required by this act not to ſail without convoy, ſhall be in imminent danger of being taken by the enemy, the commander of the ſhip ſhall make ſignals by firing guns to convey information of his danger to the reſt of the convoy, as well as to the ſhips of war under the protection of which he is ſailing; and that in caſe he is taken poſſeſſion of, he ſhall deſtroy all inſtructions confided to him, relating to the convoy; and every commander wilfully neglecting to make ſuch ſignals, or to deſtroy ſuch inſtructions, ſhall, for every ſuch offence, forfeit a ſum not exceeding 100 *l.*

The remainder of this ſtatute is employed in directing how the duties ſhall be raiſed and collected.

[350] The third and laſt ſpecies of warranty, which falls under our conſideration, is that of neutrality; or that the ſhip or goods inſured are neutral property. This condition is very different from either of the two former; for if this warranty be not complied with, the contract is not merely avoided for a breach of the warranty, but it is abſolutely void *ab initio*, on account of fraud.

fraud. This ground was entered upon in the chapter of fraud; and the principle, on which the difference turns, is this. A man may warrant that his ship ſhall ſail with convoy; and if that condition be not complied with, it is not his fault, becauſe it depends upon the acts of other men: but ſtill he is the ſufferer, for he loſes the benefit of his contract. So alſo if he warrant to ſail on a particular day, and do not, he is guilty of no crime; for that was a circumſtance, the performance of which depended on a thouſand accidents, ſuch as wind, weather, repair, &c.: but as he had expreſsly undertaken, he loſes the effect of his policy by non-compliance. But in neither of theſe caſes, as I have ſaid, is the inſured, making ſuch a warranty, guilty of any offence. Not ſo with him, who warrants property to be neutral. That is a fact, which, at the time of inſuring, muſt be within his own knowledge; and if he aſſert it to be neutral, knowing it to be otherwiſe, he is guilty of a wilful and deliberate falſhood, and incurs moral turpitude. In ſuch a caſe, therefore, the contract between the parties is abſolutely null and void to all intents and purpoſes.

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Vide c. 10

Thus on a ſpecial caſe reſerved for the opinion of the court, it appeared that an action was brought for the recovery of a total loſs on a policy of inſurance made on goods, on board the ſhip *Bona Fortuna*, at and from *North Bergen* to any ports or places whatſoever, until her ſafe arrival in *London*, "*warranted neutral ſhip and property.*" The ſhip, with the goods ſo being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was, by force of the winds, and ſtormy weather, wrecked, caſt away, and ſunk in the ſeas; and the ſaid goods were thereby wholly loſt. The ſhip called *La Bona Fortuna*, at and before the time ſhe was loſt, *was not neutral property*, as warranted by the ſaid policy. The queſtion was, whether, under ſuch circumſtances, the plaintiff could recover. Lord *Mansfield*, after hearing counſel for the plaintiff, ſtopped thoſe for the defendant, ſaying, the point was too clear to be argued. There was a falſhood, with reſpect to the thing inſured; for he inſured neutral property, when it was not ſo: therefore there *is no contract*. We muſt give judgment for the defendant.

Woolmer v. Muilman, 4 Burr. 1419. 1 Blackſt. Rep. 427. Vide ante, p. 176.

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If,

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If, however, the ſhip and property are neutral at the time when the riſk commences, this is a ſufficient compliance with a warranty of neutral property: becauſe it is impoſſible for the inſured to be anſwerable for the conſequences of a war breaking out during the voyage. The inſurer takes upon himſelf the riſk of peace or war; they are public events, equally known to both parties.

Eden and another v. Parkinſon, Doug. 732.

The plaintiffs inſured the ſhip the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*, *warranted* "*a neutral ſhip and neutral property.*" The ſhip being captured in the courſe of her voyage by ſome *Engliſh* men of war, the plaintiffs brought this action againſt the defendant, one of the underwriters on the policy, ſtating in their declaration, that the defendant ſubſcribed the policy on the 28th of *November* 1780, and averring that the ſhip and cargo were, *at that time*, neutral property. The trial came on before Lord *Mansfield* at *Guildhall*, when a verdict was found for the plaintiffs, ſubject to the opinion of the court upon a caſe ſtating, that the ſhip in queſtion ſailed from *L'Orient*, on the voyage inſured, on the 11th of *December* 1780, having the inſured cargo on board, *and both the ſhip and cargo were neutral property at the time of the ſhip's departure from L'Orient*, and ſo continued until the 20th of *December* 1780, on which day hoſtilities having commenced between the *Engliſh* and the *Dutch*, the *Dutch* ceaſed to be a neutral power, and the ſhip and cargo ceaſed to be neutral property. They were taken on the 25th of *December* 1780, and condemned as lawful prize, in the Admiralty court, on the 19th of *February* 1781.

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Lord *Mansfield*.—"Many points have been gone into in the argument on both ſides at the bar, which are not neceſſary for the deciſion of this caſe. For inſtance, there is no doubt but you may warrant a future event. But the ſingle queſtion here is, what is the meaning of this policy? I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* preſſed for a caſe, and I granted one out of reſpect to him. What is the caſe? It is an inſurance upon a ſhip and her cargo, at and from *L'Orient* to *Rotterdam*. The inſured warrant them

them neutral, and the defendant would have the court to add, by conſtruction, "and ſo ſhall continue during the whole voyage." The contract is not ſo. The inſured tell the ſtate of the ſhip and goods *then*, and the inſurers take upon themſelves all future events and riſks, from men of war, enemies, detentions of princes, &c. The parties themſelves could not have changed the nature of the property; but they did not mean to run the riſk of the war. If it made a difference what country the property belonged to, the underwriters ſhould have inquired. The riſk of future war is taken by the underwriter of every policy. By an implied warranty every ſhip muſt be tight, ſtaunch, and ſtrong; but it is ſufficient if ſhe be ſo at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours after her departure, and yet the underwriter will continue liable. The caſe of *Lilly* v. *Ewer* turns quite the other way. The deciſion there was, that the ſhip muſt ſail with convoy, according to the uſage of the trade; that is, convoy deſtined to go as far as uſual in that voyage. The preſent is the cleareſt caſe that can be. The warranty is, that things ſtand ſo at the time; not that they ſhall continue."

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Vide ante, c. 11.

Vide ſupra.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Mr. Juſtice *Buller*.—"The caſe of *Lilly* v. *Ewer* is much againſt the defendant, for it was not contended there that the ſhip muſt *continue* with the convoy during the whole voyage. The *poſtea* was delivered to the plaintiffs."

And afterwards in a ſubſequent caſe of *Saloucci* v. *Johnſon*, in the courſe of the argument, Mr. Juſtice *Buller* ſaid; I do not agree with the counſel, who contend, that the property muſt continue neutral during the whole voyage: if it be neutral at the time of ſailing, and a war break out the next day, the underwriter is liable.

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Vide infra.

And in a ſtill later caſe, which came on for trial before Lord *Kenyon* at *Guildhall*, this point was one amongſt others ſaved for the opinion of the Court of King's Bench. But when the caſe came on to be argued, the counſel for the defendant abandoned the objection upon the authority of *Eden* v. *Parkinſon*;

Tyſon and Another v. Gurney, 3 Term R. 477.

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ſon; and *Saloucci* v. *Johnſon*: ſo that this point may now be conſidered as for ever cloſed.

Having ſeen what ſhall be deemed a compliance with a warranty, aſſerting that the property inſured is neutral; and having alſo conſidered what effect the breach of ſuch a warranty has upon the contract of inſurance; it may be proper to obſerve, before this chapter is cloſed, how far our courts of law hold the ſentences of foreign courts to be concluſive evidence, that the property was not neutral; ſo as to diſcharge the underwriters.

Before we proceed to the conſideration of the effect of their ſentences, it is proper to obſerve, that the foreign courts here alluded to, the ſentences of which are in any caſe to be held conclusive, muſt be ſuch courts as are conſtituted according to the law of nations, exerciſing their functions within the belligerent country; a court of that ſtate, to which the captor belongs, held within its own territories. If therefore a *Britiſh* ſhip be captured by a *French* privateer, and carried into *Bergen* in *Norway*, a neutral ſtate, and there condemned by the *French* conſul, the ſentence is contrary to the law of nations and illegal; and if after ſuch a ſentence, the owner re-purchaſe his ſhip at a publick auction, he cannot recover the re-purchaſe money from the underwriter. Such a contract is in the nature of a ranſom, and illegal. The court of King's Bench, in deciding the above point, ſaid, it was a queſtion affecting all commercial ſtates, and the point had lately been ſolemnly decided by Sir *William Scott* (the Judge of the High Court of Admiralty), upon grounds that would recommend the deciſion to all thoſe who filled judicial ſituations (*a*).—It is certain, indeed, that the deciſion of a *French* conſul in a neutral country can only be conſidered as the act of a perſon deſtitute of all authority, except over the ſubjects of his own

Havelock v. Rockwood, 8 Term R. 268.

See the caſe of Flad Oyen, Dr. Robinſon Caſ. in the Admiralty, vol. 1. p. 135.

(*a*) It was my intention to have inſerted the very learned judgment of Sir *Wm. Scott*, in the caſe of the *Flad Oyen* at length: but I forbear to do ſo, as it is now publiſhed at length in the 8 Term Rep. p. 270. note (*a*); and alſo a full report of the cauſe in Dr. *Robinſon*'s late valuable and accurate Reports of Caſes argued and determined in the High Court of Admiralty.

country,

country, and poſſeſſing that, merely by the indulgence of the country in which he reſides; and who can have no pretence to exerciſe a juriſdiction in that neutral country in any matter, particularly in the matter of prize of war, in which the ſubjects of other ſtates may be concerned. C. H. A. P. XVIII.

But of the ſentences of foreign courts of Admiralty, duly conſtituted, the courts of juſtice in *England* will take notice. Hughes v. Cornelius, 1 Show. 234.

In the firſt caſe as to the effect of foreign ſentences upon the contract of inſurance, and warranties therein contained, it was held, that the ſentence of condemnation by a foreign court of Admiralty is not concluſive evidence, that the ſhip was not neutral; unleſs it appear that the condemnation went upon that ground: conſequently the underwriter remains liable. A ſentence of a court of Admiralty binds all the world, as to every thing contained within it; but where the cauſe of condemnation does not appear to be on the ſpecific ground material to the point in iſſue, evidence muſt be admitted in order to explain it.

Inſurance of freight and goods was made upon the ſhip the *Jane* (or *Joanna*) at and from *Venice* to *London*, "*warranted* "*neutral ſhip and neutral property.*" The cauſe was tried before Lord *Mansfield*, at *Guildhall*, when a verdict was found for the plaintiff, ſubject to the opinion of the court, upon a caſe which ſtated as follows: That the defendant underwrote the policy; that the ſhip was taken by a *French* frigate, called *La Magicienne*, as ſhe was ſailing from *Venice* on her voyage to *London*; that the plaintiff offered to give evidence on the trial, that the property of the ſhip and the property of the cargo were *neutral*; and that the papers belonging to the ſhip *fell overboard by accident*, after ſhe was brought to by the *French* frigate: but the defendant objected to ſuch evidence being received; and he produced as the ground of his objection, the ſentence of the condemnation of the ſhip in the *French* Admiralty Court, which was read, and is as follows: Bernardi v. Motteaux, Doug. 575. [354]

"*Louis Jean Marie de Bourbon, Duke de Penthievre*, Admiral "of *France*. Seen by us, the *procès verbal*, made on board the "Almeria. "The Joanna."

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" ſnow *Joanna*, taken by the king's frigate *La Magicienne*,
" commanded by M. *De Boades*, dated the 2d of *December* laſt.
" Signed *Saint Owey*, ſteward, *Bouret*, *Dominico Zané*. Seen
" by the captain commander. Signed *Boades*;—purporting
" that the ſaid 2d of *December* laſt, at five o'clock in the even-
" ing, his ſaid majeſty's frigate, *La Magicienne*, commanded
" by the ſaid captain *De Boades*, being ten leagues eaſt of
" *Cape de Moulines*, having diſcovered a ſnow ſteering ſouth-
" ſouth-weſt, the wind ſouth-weſt, and having come up with
" her, and ſtopt her, *under Venetian colours*, after an hour's
" chace, the ſaid M. *De Boades* ordered the captain to bring
" on board his muſter-roll, paſſport, and bills of loading; with
" which order the captain did not readily comply, under a
" pretence that the ſea was rough, and that his long boat was
" leaky; but, being at laſt obliged to comply, upon threats
" being made of firing on him, and being come on board, he
" declared, *that, in getting up the ſhip's ſide, the box containing*
" *his muſter-roll, his patents, and paſſport, had fallen from his*
" *pocket into the ſea*, and only ſhewed his bills of loading; by
" which they found the ſaid ſnow, the *Joanna*, of 14 men, in-
" cluding officers, commanded by *Dominico Zané of Venice*,
" *ſailed from Venice the 25th of September, with a cargo of* 12
" bales of ſilk, dried raiſins, oil, &c. and other effects men-
" tioned in the bills of loading by him exhibited, for the *account*
" *of ſundry perſons in Venice, conſigned to ſundry perſons in London*,
" *whither he was bound*. Theſe *goods going into an enemy's*
" *country*, and the loſs of his *papers*, which *had fallen into the*
" *ſea, raiſing ſuſpicions*; the ſaid ſnow had been ſtopped, and
" carried by his majeſty's frigate, *La Magicienne*, to *Almeria*,
" where ſhe had been put into the hands of the conſul, after the
[355] " ſaid *Saint Owey*, lieutenant, acting as ſteward, and the ſaid
" *Bouret*, enſign on board the ſaid frigate, had put their ſeal on
" the ſaid ſnow, where they found no papers; and taken on
" board the ſaid ſhip ten of the ſaid ſnow's crew, which were
" replaced by ſix men from on board the *Magicienne*, and three
" from the *Atalante*, with a coaſting pilot, who have brought
" the ſaid ſnow into the port of *Almeria*. *The premiſes conſi-*
" *dered*, We, by virtue of the power delegated to us as afore-
" ſaid, have declared, and declare, as good prize, the ſhip the
" *Joanna*,

" *Joanna*, her tackle, and apparel, together with the goods of her cargo, and do adjudge them to the captors; that, in " conſequence of this decree, the whole be ſold (if not already " done) in the uſual manner, and the produce divided according " to the deſire and ordinance of the king; made the 28th of " *March* 1778. We order, by theſe preſents, the vice conſul " of *France*, at *Almeria*, to look to the execution of this our " ordinance; and hereby authorize and command the firſt tip- " ſtaff, or ſerjeant, to proceed in all forms requiſite thereto. " Done at *Paris* the 13th of *January* 1779, *Rigot*." The queſtion ſtated for the opinion of the court was, whether the ſaid ſentence was not concluſive evidence againſt the plaintiff's recovering in this action. In the courſe of the arguments, the third article of the regulations of the marine of *France*, bearing date the 26th of *July* 1778, and alſo the *procès verbal*, made at the time of the capture, though not ſtated in the caſe, nor given in evidence at the trial, were ſo much referred to, and ſeemed of ſuch weight to the court, that it will be neceſſary to inſert them in this place. Arret *for the regulation of the marine, &c.* 26th *July* 1778. Art. 3. " All veſſels taken, of what na- " tion ſoever, either neutral or allied, from which it is known " that *any papers* have been *thrown* into the ſea, ſuppreſſed or ab- " ſtracted, ſhall be declared good prize; together with their " cargoes, upon the mere proof, that *ſome papers* have been " *thrown* into the ſea, without any neceſſity of examining what " thoſe papers were; by whom they were thrown; and even " though a ſufficient quantity ſhould remain on board to *juſtify* " that the ſhip and the cargo belonged to friends or allies." The *procès verbal* need not be here repeated; for although it is not ſubſtantively ſet out in the caſe, yet it is copied almoſt *verbatim* in the ſentence of the *French* Admiralty. It was admitted at the bar, that the ſentence had been appealed from, and [356] had been affirmed; but nothing new or ſpecial appeared in the proceedings on the appeal. This caſe was twice argued at the bar; and after the ſecond argument, the court deſired that it might ſtand over, in order to give time to apply to the defendant for his conſent; that the above *arret* and the *procès verbal* ſhould be added to the caſe. To this propoſition the defendant would not conſent.

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Lord *Mansfield*, upon the firſt argument ſaid:—"The firſt principles are clear and admitted. All the world are parties to a ſentence of a court of Admiralty. Here there is a monition publiſhed at the Exchange; and in other countries, at ſome place of general reſort; and any perſon intereſted may come in and appeal at any time, if there has been no *laches*. If there has, the time of appeal is limited. But the ſentence, as to that which is within it, is concluſive againſt all perſons, unleſs reverſed by the regular court of appeal. It cannot be controverted collaterally, in a civil ſuit. The difficulty here is, what the ground was, on which the *French* Admiralty went; whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime laws of all countries, throwing papers overboard is conſidered as a ſtrong preſumption of enemy's property; and upon that principle the *arret* of 1778 is founded. But in all my experience in *England*, I have never known a condemnation on that circumſtance only. It is made uſe of as a ſtrong ground of ſuſpicion. The *arret* is very rigid. It is difficult to find out what the ground of this ſentence was. *I incline* to think the court went upon the ground of *enemy's property*, and conſidered the want of the papers as a ſtrong preſumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and, upon the whole, enough does not appear on this obſcure ſentence, to aſcertain preciſely on what it was founded, and ſome other method ought to be taken to enquire what the ground of it was. As to whatever it *meant* to decide, we muſt take it to be concluſive."

Willes and *Aſhhurſt*, Juſtices, concurred with his Lordſhip.

Mr. Juſtice *Buller* inclined to doubt, and ſaid:—"To be ſure, the ſentence was obſcure, but, taking it altogether, he did not think there was much difficulty in diſcovering the grounds of it. The two circumſtances, of the cargo being conſigned to the enemy, and the falling of the papers into the ſea, are ſtated as the grounds of ſuſpicion. The latter circumſtance,—papers falling into the ſea,—could not be a ground of condemnation. The other could raiſe no other ſuſpicion, nor a preſumption of any thing elſe, but the property being enemy's property. It follows,

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follows, therefore, that the condemnation went upon that ground. If it had gone upon a *wilful throwing of papers overboard, that* would have been ſtated ſubſtantively as the ground. In the firſt place, lay the *arret* out of the caſe; and then wilful throwing papers overboard is only preſumptive evidence of enemy's property. Then take the *arret*, ſtill wilful throwing overboard might have been uſed as evidence of enemy's property, or it might have been a ſubſtantive ground under the *arret*: here it is not ſtated as a ſubſtantive ground."

Lord *Mansfield*, after the ſecond argument, ſaid; that if the *procès verbal* ſhould be agreed to be made part of the caſe, it would clearly explain the ambiguity of the ſentence; as it ſet forth the ground for taking the ſhip to have been the *arret* of *July* 1778. Without the *procès verbal*, he ſaid, the ſentence was equivocal; it took all in; and it was difficult to ſay what it went on. If the papers produced to the captor were fair, the property was neutral. But the *procès verbal* put the ground of the ſentence out of all doubt.

Mr. Juſtice *Buller* alſo declared, that he thought the *procès verbal* muſt be taken as part of the proceedings, and, as that expreſsly referred to the *arret*, as the ground of the capture, and the ſentence was conſiſtent with it, the ſentence muſt be taken to be founded on the *arret*. But he adhered to his former opinion, *on the caſe as ſtated without the procès verbal*, namely, that the interpretation of the ſentence, taken by itſelf, muſt be, that the condemnation went on the ground of enemy's property, and was, therefore, concluſive againſt the plaintiff.

The final refuſal of the defendant was ſignified by Mr. *Lee*, who aſſigned as a reaſon for it, that the *procès verbal* was not a proceeding in the *French* court of Admiralty, but merely an account of what paſſed on the capture, reduced into writing, at the time. He alſo obſerved, that, in the ſentence, all the *procès verbal, except* the concluding part, which refers to the *arret* of *July* 1778, was recited, and this afforded a ſtrong argument for inferring, that the court had purpoſely omitted that part of it, to ſhew that they did not condemn the ſhip on the ground of the *arret*. [358]

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Lord *Mansfield* diſapproved much of the defendant's refuſal, but he ſaid, he thought the juſtice of the caſe might ſtill be got at, on the ground of the ambiguity of the ſentence, which did not mention a word about the property *being enemy's property*; that it was clear the *French* Admiralty meant to proceed on the ground *of throwing the papers overboard:* and he agreed with the counſel for the plaintiff, that the *procés verbal* ought to be conſidered as part of the proceedings, and that the ſentence ought not to have been read without it.

Mr. Juſtice *Buller* thought there was weight in what had been obſerved by Mr. *Lee*, on the reaſon for omitting the concluding part of the *procés verbal* in the ſentence. Indeed, it was not clear that what was now offered to be produced, was the ſame *procés verbal* which the ſentence recites; and if it could be ſuppoſed that the captain had made another, omitting the reference to the *arret* as the ground of the capture, *that* could only be accounted for, by his having found that the capture could not be ſupported on that ground.

Mr. Juſtice *Willes* thought it moſt manifeſt, that the *procés verbal* made at the time of the capture was that, on which the ſentence proceeded. The ſentence began with mentioning it, and recited it exactly, as to date, and every thing elſe, as far as it went. The word *purporting* did not require a recital of the whole; and it was not neceſſary for the Admiralty Court to ſet forth the captain's reaſons for detaining the ſhip. He had all along been of opinion that the ſentence was ſo ambiguous, that it did not appear that the cauſe of condemnation was that the property was neutral, and therefore had thought evidence neceſſary to explain it.

Mr Juſtice *Aſhburſt* concurred, as to the ambiguity of the ſentence, and that it was, therefore, not concluſive; and on that ground, Lord *Mansfield*, and *Willes* and *Aſhburſt*, Juſtices, declared their opinion that the *poſtea* ought to be delivered to the plaintiff. *Lee* ſtill urged the danger of opening the ſentences of foreign courts of Admiralty, which are generally informal; upon which Lord *Mansfield* ſaid, all the ſuppoſed incon-

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inconvenience would be obviated, if the foreign courts would ſay in their ſentences, "*Condemned as enemy's property.*"

In the caſe juſt reported, it is admitted by all the judges, that a ſentence of a court of Admiralty abroad is binding upon all parties, as to what appears upon the face of it. And therefore if it appear evident, without a poſſibility of doubt or ambiguity, that the ſentence proceeded upon the ground of the property not being neutral, that is concluſive evidence againſt the inſured, that he has not complied with his warranty; and conſequently the underwriter is no longer reſponſible. This was fully ſettled in the caſe of *Barzillay* v. *Lewis*.

Barzillay v. Lewis, B. R. Trin. Term, 22 Geo. III.

It was an action on a policy of inſurance on a ſhip from *Liverpool* to *Amſterdam*, *warranted Dutch property*; and it was brought to recover for a total loſs, the ſhip having been captured by the *French*, and condemned by the court of Admiralty there. The plaintiff (the inſured) was nonſuited in this action, from an idea, that the decree of the parliament of *Paris* was deciſive againſt him, that he had not complied with his warranty. Upon a motion to ſet aſide this nonſuit, the following facts appeared from the report of the judge who tried the cauſe: The ſhip in queſtion was originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *Engliſh* privateer, and carried into *Liverpool*, where ſhe got the name of *The Three Graces*. A merchant at *Liverpool* afterwards bought her for a houſe at *Amſterdam*, and a paſſport was ſent for her from thence. She was then inſured by a *Dutch* name, and warranted as in the policy; ſhe went to ſea, was captured by a *French* ſhip; and carried into *St. Maloes*, where ſhe was releaſed by the Vice Admiralty Court, as being *Dutch*. But upon an appeal to the parliament of *Paris*, the ſentence was reverſed, and ſhe was condemned as lawful prize, by the name of *The Three Graces of Liverpool*. It appeared in evidence, that there were certain *French* ordinances, which ordain, that where more than one third of the crew of a neutral ſhip are enemies to the king of *France*, the ſhip ſhall be confiſcated: that no ſhip ſhall be conſidered as transferred, till ſhe has been within the port of the purchaſer; and that a paſſport ſhall be deemed fraudulent,

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fraudulent, unleſs the ſhip has been in the port from whence it has been obtained. The ſhip's crew in queſtion, conſiſted of ſixteen, five of whom were *French*, four were *Danes*, two were *Swedes*, one was *Dutch*, one *Portugueze*, one *Hamburger*, one *Norwegian*, and one *Iriſhman*. Some of the crew ſwore, that they were hired by *Engliſhmen*, and that both the ſhip and the cargo were *Engliſh*. They alſo ſwore, that when the ſhip which took them came in ſight, the captain ſailed back towards the *Engliſh* coaſt: but one of the crew having informed him, that the ſhip in ſight carried *Engliſh* colours, he reſumed his courſe.

Lord *Mansfield*.—"The ſentence of the court of Appeal in *France* is concluſive. The queſtion is, what that ſentence means. She is condemned as not being a *Dutch* ſhip. The warranty is, that ſhe is *Dutch*, which is falſe. The law of nations is founded on eternal principles of juſtice; and in every war the belligerent powers make particular regulations for themſelves. But no nation is obliged to be bound by them, unleſs they are agreeable to the general laws of nations; but all third perſons and mercantile people are. In this caſe, the plaintiffs warrant this ſhip to be *Dutch*; and they know they muſt conform to the marine regulations of *France*. The inſurers took the riſk upon this warranty; but her paſs was not agreeable to the treaty. The parliament of *Paris* did not condemn her as the *Dutch* ſhip of *Amſterdam* by her *Dutch* name; but as "*The Three Graces of Liverpool*." Indeed ſhe had none of the requiſites of a *Dutch* ſhip; and the regulations require that ſhe ſhould have been into the port of the purchaſer, in order to transfer the property; the knowledge of all which circumſtances the inſured, by his warranty, took upon himſelf. I am therefore of opinion, that the warranty was falſe."

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

As to this point ſee poſt, p. 362. Mayne v. Walter, and Mr. Juſt. Buller's opinion in Saloucci v. Johnſon, poſt 395.

Mr. Juſtice *Buller*.—"The ſtrongeſt ground ſeems to be, that ſhe was warranted to be *Dutch* property; and yet had none of the documents neceſſary to protect a neutral ſhip, *conſiſtent with the regulations of the court of France*." The rule to ſet aſide the nonſuit was accordingly diſcharged.

So

De Souza v. Ewer, Sitt. at Guildhall after Hilary 1789.

So alſo in another caſe, where an inſurance was made on the ſhip *Arainha de Portugal*, at and from *Liſbon* to *Bombay*, *warranted a Portugueze ſhip*; the ſhip was captured in *December* 1782, by the *French*, under the command of Monſ. *de Suffrein*. The ſentence of *Suffrein* was in theſe words: We declare that the ſhip called the *Queen of Portugal*, carrying *Portugueze* colours, was ſeized only in conſequence of the 7th article of the regulations concerning the navigation of neutrals, which ſays, that all ſhips of an enemy's conſtruction, which ſhall not carry a bill of ſale of a date prior to the hoſtilities, ſhall not be conſidered as neutral, and ſhall be declared good prize; and the ſaid ſhip having been built at *Bombay* under the name of *Arnable*, and navigated under *Engliſh* colours till 1781, when ſhe took *Portugueze* colours, is abſolutely in the ſituation above-mentioned. The ſentence proceeded to declare, that the confiſcation did not proceed on the ground of want of papers, a *verbal procēs* having proved, that they were deſtroyed by ſome ſeas ſhipped in the courſe of the voyage; and it alſo ſtated, that there were no contraband goods on board. From this ſentence *De Souza* appealed to the council of prizes at *Paris*; and on the 4th of *January* 1786, that board, after reciting the ſentence of *Suffrein*, proceeds thus: "We, "by virtue of the power given to us by our ſaid office of "Admiral, adopting the declaration of the bailiff *de Suffrein*, "have declared, and do declare the ſaid ſhip *Queen of Portugal*, "*&c. good prize*; and have, and do confiſcate the ſame for "the benefit of the king." *De Souza* ſtill further appealed to the King in council; and on the 8th of *May* 1787, the following ſentence was pronounced, after reciting all the former ſentences and other documents in the cauſe: "His ma"jeſty has ordained, and does ordain, that the ſentence of the "Council of Prizes of 4th *January* 1786, ſhall be executed, "agreeable to its form and tenor."

As ſoon as theſe ſentences were opened, Lord *Kenyon*, Chief Juſtice, was of opinion, that they were concluſive evidence againſt the warranty entered into by the plaintiff. The courts abroad, whoſe ſentences have been mentioned, were competent to the deciſion of the point; and we muſt ſuppoſe that

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that they have done properly, and have acted according to the *jus inter gentes*. This ſhip was condemned becauſe ſhe had not thoſe documents to prove her neutrality, which are required by the ordinances of *France*. The courts which condemned this ſhip proceeded according to the laws of nations, as all courts of Admiralty do; but here it is ſufficient, that they had a juriſdiction over the ſubject matter.

See the opinion of Mr. Juſtice Buller in the preceding caſe, Acc. but ſee Saloucci v. Johnſon, poſt, p. 365.

The plaintiff was nonſuited; and no application was ever made to ſet it aſide.

It has alſo been determined, that where no ſpecial ground at all is ſtated; but the ſhip is condemned generally as good and lawful prize, the court here muſt conſider it as concluſive evidence that the property was not neutral, and will not again open the proceedings of the court abroad in favour of the party, who has warranted his property to be neutral.

Saloucci v. Woodmaſs, B.R. Hil. 24 Geo. III.

An action was brought upon a policy of inſurance on goods *warranted neutral* on board the *Thetis*, *a Tuſcan ſhip*, to recover the amount of the inſurance from the underwriters. The ſhip had been taken in the courſe of her voyage by a *Spaniſh* veſſel, carried into *Spain*, and her cargo was there condemned "*as good and lawful prize.*" There was an appeal to a ſuperior court, which reverſed the ſentence: but upon a further appeal, the latter deciſion was overturned, and the former confirmed. At the trial of this cauſe before Lord *Mansfield*, his lordſhip being of opinion that the ſentence of the *Spaniſh* Court of Admiralty was concluſive evidence of the falſhood of the plaintiff's warranty, the plaintiff was nonſuited. A motion was made, and fully argued to ſet aſide the nonſuit, which was unanimouſly refuſed by the whole court of King's Bench.

Lord *Mansfield*.—"The policy here warrants that this cargo was neutral property. It appears from the policy itſelf, that the ſhip was neutral; becauſe it is called a *Tuſcan* ſhip; but the warranty is that the goods are neutral. It muſt be preſumed from the condemnation, as no other cauſe appears, that it proceeded on the ground of the property belonging to an enemy. In the caſe of *Bernardi* v. *Motteux*, the deciſion of the

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the court turned upon the particular ground of the confiſcation appearing on the face of the ſentence; and that it did not appear to be on the ground of being enemy's property. This being ſo, the court gave the party an opportunity to ſhew by evidence, that the ſpecifick ground was really the cauſe of the condemnation. In this caſe, at *Guildhall*, the counſel admitted the general rule; but they ſaid, if a copy of the proceedings could be had, a ſpecial cauſe would appear. The proceedings are now come; and from them it appears, that the queſtion turned entirely upon the property of the goods. For in the ſecond court, to which they appealed from the ſentence of the firſt, the queſtion was, whether the goods were free: the decree was, that they were. But the third court overturned the deciſion of the ſecond. It is ſufficient, however, that no ſpecial ground is ſtated; and therefore the rule muſt be diſcharged."

If a foreign Court of Admiralty condemns a ſhip (warranted *American*) *as enemy's property*, for not having on board a *role d'equipage* or liſt of the crew, which is required by a *French* ordinance to be on board the ſhip, and which the Court of Admiralty *adjudged* to be requiſite *within the meaning and conſtruction of the treaty* between the two countries of *France* and *America*, the Court of King's Bench held that the adjudication in *France* was concluſive againſt the warranty, that ſhe was an *American* ſhip, though in fact ſhe was ſo; that point being clearly within the juriſdiction of the foreign Court (*a*). Geyer v. Aguilar, 7 Term R. 681.

But where there is *no warranty* of being *American*, a ſentence adjudging a ſhip to be good prize, *as belonging to the enemies of the republick*, negatives no fact, which it was incumbent on the aſſured, having made no warranty, to eſtabliſh: for the *Engliſh* courts are only bound by the decretory, or concluding Chriſtie v. Secretan, 8 Term R. 192.

(*a*) Even where there has been no ſentence of condemnation, if a ſhip is warranted *American*, and ſails without ſuch a paſſport, as is required by the treaty between *France* and *America*, the warranty is not complied with, and the underwriters are diſcharged; even though the ſhip ſuffers no inconvenience from the want of it. Such a warranty does not mean merely that the ſhip is *American* property, but that ſhe is entitled to all the privileges of an *American* flag. Rich v. Parker, 7 Term R. 705.

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cluding part of the ſentence, and, where the adjudication is on the ground of enemy's property, are not bound to examine the premiſes that led to the concluſion. If, indeed, there had been a warranty, the adjudication that it was enemy's property would have been concluſive againſt ſuch a warranty.

See ante, 359.

If the ground of deciſion appear to be not on the want of neutrality, but upon a foreign ordinance manifeſtly unjuſt, and contrary to the laws of nations, and the inſured has only infringed ſuch a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty, ſo as to diſcharge the inſurer.

Mayne v. Walter, B. R. Eaſter, 22 Geo. III.

In a policy of inſurance, *the ſhip was warranted to be Portugueze*; and having been taken in her voyage by a *French* privateer, ſhe was carried into *France*. The Court of Admiralty condemned her becauſe ſhe had an *Engliſh* ſupercargo on board. It appeared that there was a *French* ordinance, prohibiting any *Dutch* ſhip from carrying a ſupercargo belonging to any nation at enmity with the court of *France*. In an action againſt the underwriter, theſe facts appeared; upon which, a verdict was found for the plaintiff, ſubject to the opinion of the Court, upon this queſtion, whether the circumſtance of having an *Engliſh* ſupercargo was a breach of neutrality; and whether ſuch a ſentence was concluſive?

Lord *Mansfield*.—"It is an arbitrary and oppreſſive regulation, contrary to the law of nations, and there is no proof that the plaintiff knew any thing of it. If you were both ignorant of it, the underwriter muſt run all riſks; and if the defendant knew of the edict, it was his duty to enquire, if there was ſuch a ſupercargo on board. It muſt be a fraudulent concealment to vitiate a policy. But it is remarkable that neither party has ſaid any thing of the treaties between *France* and *Portugal*; neither party ſeems to know any thing about them, and yet the whole caſe turns upon them." Judgment for the plaintiff.

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One more rule is worthy of obſervation; which is, that though the veſſel be condemned as prize, yet if the grounds of

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the ſentence appear manifeſtly to contradict ſuch a concluſion, the court here will not diſcharge the underwriters by declaring that the inſured has broken his warranty. CHAP. XVIII.

In an action on a policy of inſurance on the captain's goods and private adventure, warranted *American* property, on board the ſhip *Friends*, at and from *London* to *Virginia*, a ſentence of a *French* Court of Admiralty was produced, which was to the following effect: "Foraſmuch as the true deſtination of "the ſhip was for the *Engliſh* iſlands, having been hired and "loaded at *London*, and that there has been found on board "her 80 barrels of gunpowder; the court declares the ſaid "brig *Friends*, together with her cargo, *a good prize*." Calvert v. Bovill, 7 Term R. 523.

The court of King's Bench held that this ſentence was not concluſive againſt the warranty of neutrality, the facts of the caſe and the reaſons expreſsly given, leading to a contrary concluſion. If the ſentence, indeed, had condemned the goods, becauſe they were the property of an enemy, that judgment would have been concluſive, but they have given other reaſons for their ſentence.

The following caſe upon the forfeiture of neutrality has been, as to one of the main points of it, namely the right of nations at war, to ſearch neutral ſhips, conſiderably ſhaken by a deciſion of the High Court of Admiralty, and alſo by one in the Court of King's Bench.

It was an action brought upon a policy of inſurance on the ſhip *Thetis*, a *Tuſcan* ſhip, *warranted neutral*. At the trial a verdict was found for the plaintiffs, ſubject to the opinion of the court, upon a caſe ſtating, That the plaintiffs were *Tuſcan* ſubjects reſident at *Leghorn*: that the ſhip, having *neutral goods* on board conſigned to *London*, was captured off the coaſt of *Barbary* by a *Spaniſh* veſſel. That ſhe was carried into *Spain*, and there condemned as prize; which ſentence upon appeal to a ſuperior court, was reverſed: but upon a further appeal, the laſt ſentence was reverſed, and the firſt confirmed. That the grounds of condemnation were two; 1ſt, That the Saloucci v. Johnſon, B. R. Hill. 25 Geo. III.

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ſhip *Thetis* refuſed to be ſearched, and reſiſted with force, having fired at the ſhip of the *Spaniard:* 2d, That the *Thetis* had no charter-party on board. The captain anſwers theſe two grounds thus; 1ſt, That he reſiſted and fired, the *Spaniard* having hailed him under falſe colours: 2d, That he had taken the goods on board by the piece, and had not freighted her to any individual; in which caſe a manifeſto was ſufficient, without a charter-party. The ſentence of the laſt court admits the ſhip to be neutral; for it ſtates it to be "the ſhip *Thetis*, a *Tuſcan* ſhip, *&c.*"

Lord *Mansfield* was abſent at the argument of this caſe.

Mr. Juſtice *Willes*.—"This is clearly a neutral ſhip. Something was ſaid in argument about barratry; but I do not think the act of the Captain in this caſe amounts to that offence. The ſecond ground of condemnation is given up by the counſel; and the remaining queſtion is, whether the Captain has been guilty of ſuch a breach of neutrality, as ſhould affect the owners. If a ſhip be neutral, and ſhe be ſtopped, thoſe, who ſtop her, muſt pay for the detention. But it is ſaid ſhe muſt ſtop to be ſearched. I find no authority for ſuch a poſition. Beſides, the circumſtances are very ſuſpicious. The Captain ſeems to have acted properly. Stoppage is always at the peril of the captors."

[365] Mr. Juſtice *Aſhhurſt*.—"I take the principle laid down at the bar to be true, that a ſhip warranted neutral, muſt conduct herſelf ſo as not to forfeit her neutrality. But the facts of this caſe do not admit of the application. I do not find, that a neutral ſhip muſt ſubmit to be ſearched. It is rather an act of ſuperior force, always reſiſted when the party is able; and the right falls within this poſition, that the ſearcher does it at his peril. If he find any thing contraband, or the property of an enemy, he is juſtified: if not, he pays coſts. Is there any thing to juſtify the ſearch in this caſe? certainly not, for the cargo was neutral."

Mr. Juſtice *Buller*.—"It is not neceſſary to give an opinion as to barratry; but I take it to mean a wilful act of the captain

to the injury of the owners. This would have been barratry, if it had been an act, which forfeits the neutrality. I do not agree that the property muſt continue neutral during the whole voyage. If it be neutral at the time of ſailing, it is ſufficient; and if a war break out next day, the underwriter is liable. The anſwer given to the claim of ſearch is concluſive, that the party does it at his peril; juſt like the caſe of Cuſtom-houſe officers. The practice of the Admiralty confirms it; for they give coſts in caſes of improper detention: which they would not do, if neutral ſhips were, at all events, liable to be ſtopt. Detention by particular ordinances, which do not form a part of the law of nations, is a riſk within the policy. At firſt I compared this caſe in my own mind to that of an illegal voyage; but they are no way ſimilar; for a ſhip is only bound to take notice of the laws of the country ſhe ſails from, and of that to which ſhe ſails; but not the particular ordinances of other powers." Judgment was accordingly given for the plaintiff.

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This caſe, thus decided, came under the conſideration of the Court of King's Bench in the year 1799. It was an action on a policy on goods in the ſhip *Diſpatch*, warranted *Daniſh ſhip and property*. The loſs was alleged to be by capture. A ſentence of a *Britiſh* Court of Admiralty was produced, ſtating, that the ſaid neutral ſhip *Diſpatch*, with the cargo, being *Daniſh* property, had been under the authority of the law of nations and of war, and agreeably to exiſting treaties ſtopped and detained, by the commander of one of his majeſty's ſhips, and by him ſent towards the port of *Mole St. Nicholas, for the purpoſe of being legally examined*, under the command of *Barrett*, a midſhipman, and two ſeamen; and that on the near approach to the port, the maſter, ſupercargo and crew of the ſaid ſhip, had, *in direct violation and breach of their neutrality as Daniſh ſubjects, and contrary to the law of nations and the faith of treaties*, forcibly reſcued and taken and kept poſſeſſion thereof till again captured by a *French* privateer, and ſhe was again captured by one of his majeſty's ſhips; and the ſaid neutral ſhip and cargo were therefore adjudged good prize.

Garrells v. Kenſington, 8 Term R. 230.

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The court was of opinion, that the ſentence of the Court of Admiralty was concluſive that this veſſel had ſo conducted herſelf as to forfeit her neutrality; by acting in violation of that neutrality, and contrary to the law of nations and faith of treaties. That as to the queſtion concerning the right of ſearching neutrals, it was ſaid by the court, that before the late armed neutrality it was conſidered in this country, and ſo decided in many caſes, that the right of ſearching neutrals was part of the law of nations; and that ſuch right was ſuppoſed to be founded on reaſon. Judgment was given for the defendant.

The court, however, in the above caſe, ſaid, they did not mean to overturn the caſe of *Saloucci* v. *Johnſon*, for in that caſe the Court of Admiralty had not adjudged, as in the preſent caſe, that the ſhip had forfeited her neutrality. But the general point there mentioned that a neutral ſhip need not ſubmit to be ſearched, cannot be ſupported; for it is laid down in *Vattel*, that this right clearly exiſts, without which the commerce of contraband goods could not be prevented.

Vattel, book 3. ch. 7. ſ. 114.

Beſides which in a late caſe in the Court of Admiralty, Sir *William Scott* thus ſtates the law: "That the right of viſiting and ſearching merchant ſhips upon the high ſeas, whatever be the ſhips, whatever be the cargoes, whatever be the deſtinations, is an inconteſtible right of the lawfully commiſſioned cruizers of a belligerent nation; becauſe till they are viſited and ſearched, it does not appear what the ſhips, or the cargoes, or the deſtinations are; and it is for the purpoſe of aſcertaining thoſe points that the neceſſity of this right of viſitation and ſearch exiſts. This right is ſo clear in principle that no man can deny it, who admits the legality of maritime capture; becauſe if you are not at liberty to aſcertain by ſufficient enquiry whether there is property that can legally be captured, it is impoſſible to capture. Even thoſe who contend for the inadmiſſible rule, *that free ſhips make free goods*, muſt admit the exerciſe of this right at leaſt for the purpoſe of aſcertaining whether the ſhips are free ſhips or not. The right is equally clear in practice, for practice is uniform and univerſal

The Maria, Paulſen, Maſter, decided the 11th June 1799, and the report publiſhed by Dr. Robinſon.

verſal upon the ſubject. The many *European* treaties which refer to this right, refer to it as pre-exiſting, and merely regulate the exerciſe of it. All writers upon the law of nations unanimouſly acknowledge it, without the exception even of *Hubner* himſelf, the great champion of neutral privileges. In ſhort, no man in the leaſt degree converſant in ſubjects of this kind has ever, that I know of, breathed a doubt upon it. The right muſt unqueſtionably be exerciſed with as little of perſonal harſhneſs and of vexation in the mode as poſſible; but ſoften it as much as you can, it is ſtill a right of force, though of lawful force, ſomething in the nature of civil proceſs, where force is employed, but a lawful force, *which cannot lawfully be reſiſted.*" In another place, this very learned perſon adds "The penalty for the violent contravention of this right is the confiſcation of the property ſo withheld from viſitation and ſearch(*a*)."

Theſe are the caſes which have been decided, relative to the judgments of foreign courts being concluſive, and the effects which they have upon the contract of inſurance: and from all of them it ſhould ſeem, that this general doctrine may be collected: That wherever the ground of the ſentence is manifeſt, and it appears to have proceeded expreſsly upon the point in iſſue between the parties; or wherever the ſentence is general, and no ſpecial ground is ſtated, there it ſhall be concluſive and binding, and the courts here will not take upon themſelves, in a collateral way, to review the proceedings of a forum, having competent juriſdiction of the ſubject matter. But if the ſentence be ſo ambiguous and doubtful, that it is difficult to ſay on what ground the deciſion turned; there evidence will be allowed in order to explain. And if the ſentence upon the face of it be founded upon partial ordinances, the inſured ſhall not be deprived of his indemnity; becauſe, to uſe the words of Mr. Juſtice *Buller*, any detention, by particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a riſk within a policy of inſurance.

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(*a*) I am ſorry that I cannot tranſcribe more of this judgment, ſo fraught with learning, and ſo eloquent in its compoſition: but it is the leſs to be lamented, as Dr. *Robinſon* has gratified the publick by publiſhing it entire, as pronounced, in a pamphlet entitled, *a Report of the Judgment, &c. on the Swediſh Convoy.*

CHAPTER THE NINETEENTH.

Of Return of Premium.

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HAVING in ſeveral chapters ſpoken fully of the various caſes, in which policies of inſurance are either abſolutely void, or are rendered of no effect by the failure of the inſured in the performance of ſome of thoſe conditions, which he had taken upon himſelf: the next object of our enquiry will be, in what caſes, and under what circumſtances, there ſhall be a return of premium.

In all countries, in which inſurances have been known, it has been a cuſtom, coeval with the contract itſelf, that where property has been inſured to a larger amount than the real value, the inſurer ſhall return the overplus premium; or if it happen that goods are inſured to come in certain ſhips from abroad, but are not in fact ſhipped, the premium ſhall be returned. If the ſhip be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the inſured is not, it ſhould ſeem the latter will be entitled to have his premium reſtored, on the ground of fraud. But if both parties be ignorant of the arrival, and the policy be (as it uſually is) *loſt or not loſt*, I think in that caſe the underwriter ſhould retain; becauſe under ſuch a policy, if the ſhip had been loſt, at the time of ſubſcribing, he would have been liable to pay the amount of his ſubſcription. The parties themſelves frequently inſert clauſes in the policy, ſtating, that upon the happening of a certain event, there ſhall be a return of premium. Theſe clauſes have a binding operation upon the parties; and the conſtruction of them is a matter for the court, and not for the jury, to determine.—In ſhort, if the ſhip, or property inſured, was never brought within the terms of the written contract, ſo that the inſurer never has run any riſk, the premium muſt be returned.

Loccenius de jure marit. l. 2. c. 5. ſ. 8.

2 Mag. 90.

Dougl. 208.

2 Vezey 319.

The principle, upon which the whole of this doctrine depends, is ſimple and plain, admitting of no doubt or ambiguity. The

riſk or peril is the conſideration for which the premium is to be paid: if the riſk be not run, the conſideration for the premium fails; and equity implies a condition, that the inſurer ſhall not receive the price of running a riſk, if, in fact, he runs none. It is juſt like the contract of bargain and ſale; for if the thing ſold be not delivered, the party who agreed to buy, is not liable to pay. Thus to whatever cauſe it be owing, that the riſk is not run, as the money was put into the hands of the inſurer, merely for the riſk of indemnifying the inſured, the purpoſe having failed, he cannot have a right to retain the ſum ſo depoſited for a ſpecial cauſe.

Pothier n. 179. 3 Burr. 1240. Roccus, Not. 88. Cowp. 668.

Accordingly in an action of *indebitatus aſſumpſit* brought by the plaintiff for 5 *l.* received by the defendant to the plaintiff's uſe, where the general iſſue was pleaded; it appeared in evidence, that one *Barkdale* had made a policy of inſurance upon account for 5 *l.* premium in the plaintiff's name, and that he had paid the ſaid premium to the defendant, and that *Barkdale* had no goods then on board, and ſo the policy was void. To this action two objections were taken: 1ſt, That it ſhould have been brought in *Barkdale*'s name, which was over-ruled. 2dly, That this ought to have been a ſpecial action on the cuſtom of merchants. Lord Chief Juſtice *Holt* cited a caſe of money depoſited upon a wager concerning a race, that the party winning might bring an action of *indebitatus aſſumpſit*, for money received to his uſe; for now by the ſubſequent matter it is become as ſuch. And as to the caſe in queſtion, the money is not only to be returned by the cuſtom, but the policy is made originally void, the party, for whoſe uſe it was made, having no goods on board; ſo that by this diſcovery, the money was received without any reaſon, occaſion, or conſideration, and conſequently it was received originally to the plaintiff's uſe. And ſo judgment was given for the plaintiff.

Martin v. Sitwell, 1 Show. 156.

I cite this caſe for two purpoſes; becauſe it ſerves to ſhew in what form of action the plaintiff ought to demand a return of premium: and it alſo points out, that as early as the beginning of the reign of *William* and *Mary*, the true principle, on which

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the premium ought to be returned, was fully eſtabliſhed. It was ſaid in the introduction to this chapter, that clauſes are frequently inſerted in policies of inſurance, containing conditions, on the performance or non-performance of which, the premium is returnable; and that to decide upon the conſtruction of ſuch conditions is the province of the court, and not of the jury. Such a caſe occurs, which may properly be mentioned here.

Simond and another v. Boydell, Doug. 255.

This action was brought againſt an underwriter, for a return of premium. The material part of the policy was in theſe words: "At and from any port or ports in *Grenada* to *London*, "on any ſhip or ſhips that ſhall ſail on or between the firſt of "*May* and the firſt of *Auguſt* 1778, at 18 guineas *per cent.* "to return 8*l. per cent. if ſhe ſails from any of the Weſt India* "*iſlands, with convoy for the voyage, and arrives.*" At the bottom there was a written declaration that the policy was on ſugars (the muſcavado valued at 20*l.* per hogſhead) for account of *L. Q.* being on the firſt ſugars which ſhall be ſhipped for that account. The ſhip the *Hankey* ſailed with convoy, within the time limited, having on board 51 hogſheads of muſcavado ſugar, belonging to *L. Q.* She arrived ſafe in the *Downs*, where the convoy left her; convoy never coming farther, and indeed ſeldom beyond *Portſmouth*. After ſhe had parted with the convoy, ſhe ſtruck on a bank called the *Pan Sand*, at *Margate*, and 11 of the 51 caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off the bank, and proceeded up the river, arrived ſafe in the port of *London*, and was reported at the cuſtom-houſe. The ſugars ſaved were taken out at *Margate*, and, after undergoing a ſort of cure, by a perſon ſent from town for that purpoſe, they were carried to *London* in other veſſels; and the 40 hogſheads being ſold, produced 340*l.* inſtead of 800*l.* which was their valuation in the policy. The defendant had paid into court the value of the ſugars loſt, and a return of 8*l. per cent.* on 340*l.* The plaintiffs inſiſted, that they were entitled to have 8*l. per cent.* alſo returned on the *valued* price of the eleven hogſheads of ſugar, which were loſt, and on the difference between what the remaining forty hogſheads produced, and their valued price. At the

the trial, before Lord *Mansfield*, the plaintiffs had a verdict to the full amount of their demand. The chief queſtion, upon the motion for a new trial, was, to what the word "*arrives*" was intended to apply.

Lord *Mansfield*. "The ancient form of a policy of inſurance, which is ſtill retained, is, in itſelf, very inaccurate; but length of time, and a variety of diſcuſſions and deciſions, have reduced it to certainty. It is amazing, when additional clauſes are introduced, that the merchants do not take ſome advice in framing them, or beſtow more conſideration upon them themſelves. I do not recollect an addition made, which has not created doubts on the conſtruction of it. Here a word or two more would have rendered the whole perfectly clear. However, I have no doubt how we muſt conſtrue this policy. Dangers of the ſea are the ſame in time of peace and of war; but war introduces hazards of another ſort, depending on a variety of circumſtances, ſome known, others not, for which an additional premium muſt be paid. Thoſe hazards are diminiſhed by the protection of convoy, and if the inſured will warrant a departure with convoy, there is a diminution of the additional premium. If the inſured will not warrant a departure with convoy, he pays the full premium, and in that caſe the underwriter ſays, "If it turn out that the ſhip departs with "convoy, I will return part of the premium." But a ſhip may ſail with convoy, and be ſeparated from it by a ſtorm, or other accident, in a day or two, and loſe its protection. On a warranty to ſail with convoy, that would not be a breach of the condition; but to guard againſt that riſk, the inſured adds, in policies of the preſent ſort, "the ſhip muſt not only ſail "with convoy, but ſhe muſt *arrive*, to entitle me to the re-"turn." The words, *and arrives*, do not mean that the ſhip ſhall arrive in the company of the convoy, but only that ſhe herſelf ſhall arrive. If ſhe does, that ſhews, either that ſhe had convoy the whole way, or did not want it. But, in the ſtipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ſhip. The conſtruction, contended for by the defendant, is adding a comment longer than the text. If it had been meant that no

Vide ante, c. 18.

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return ſhould be made, unleſs *all* the goods arrived *ſafe*, they would have ſaid, "if the ſhip arrive *with all the goods*," or "*ſafely with all the goods*." The total or partial loſs of the goods was the ſubject of the indemnity, and muſt be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive ſafe or not, makes no part of the queſtion. The ſingle principle which muſt govern is, that in the events which have happened, the war riſk has been rated too high."

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Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, were of the ſame opinion.

Mr. Juſtice *Buller*.—"I am of the ſame opinion. *The queſtion is for the deciſion of the court, not of a jury*, ſince it ariſes on the conſtruction of a written inſtrument. What gives riſe to an increaſe of the premium? The danger of capture. When that danger is diminiſhed, the conſtruction muſt be, that there ſhall be a proportional return of premium." The rule for a new trial was accordingly diſcharged.

Aguilar and others v. Rodgers, 7 Term Rep. 421.

So alſo in a later caſe, where, in a policy on freight, this clauſe was found "to return 10 *l. per cent. if the ſhip ſailed with convoy and arrived*;" it was contended at the bar that, although the ſhip ſailed with convoy, and although ſhe arrived at her port of deſtination; yet as ſhe had been captured and recaptured during the voyage, and had paid ſalvage to the recaptors, the plaintiffs (the aſſured) were not entitled to a return of premium within the true conſtruction of the above clauſe.

Lord *Kenyon* delivered the unanimous opinion of the court: I agree with the counſel for the defendant, that every arrival of the ſhip at her port of deſtination would not be an arrival within the fair conſtruction of this memorandum; ſuch, for inſtance, as an arrival in the poſſeſſion of an enemy at a neutral port; or an arrival at her port in *England* as the property of other perſons after a capture. But in order to ſatisfy the meaning of the memorandum, it ſhould be *an arrival at the deſtined port in the courſe of her voyage*. It is now too late to controvert

controvert the authority of *Hamilton* v. *Mendes*, even if we were diſpoſed to do ſo, which I am not, where it was holden that though the aſſured may abandon on hearing of a capture, yet if they do not abandon, and the ſhip be afterwards recaptured, it muſt be conſidered as if ſhe had never been out of the poſſeſſion of the owners. It is 18 years ſince the caſe of *Simond* v. *Boydell* was decided; that caſe muſt be well known in the commercial world; and if the parties in this caſe had intended to make an agreement different from that which the words uſed in this memorandum import, they would have added after *arrived*, "ſafely from the enemy," or ſome words to that effect. But the words here uſed are not equivocal; and we ought not to depart from them: it would be attended with great miſchief and inconvenience if in conſtruing contracts of this kind we were not to decide according to the words uſed by the contracting parties. Suppoſe this queſtion had ariſen on a contract under ſeal, and an action of covenant had been brought, aſſigning as a breach the non-arrival of the ſhip at the port of *London*, the anſwer that in fact the ſhip did arrive there in the courſe of her voyage would have been deciſive. And if ſo, this memorandum muſt receive the ſame conſtruction in this action. On the grammatical conſtruction of the words, which is the ſafeſt rule to go by, I am of opinion that the verdict obtained by the plaintiff ought not to be ſet aſide.

By the law of *England*, it has been clearly ſettled, that whether the cauſe of the riſk not being run, is attributable to the *fault*, *will*, *or pleaſure* of the inſured, ſtill the premium is to be returned. Foreign writers have in ſome meaſure differed in opinion upon this point; and it may not be improper to obſerve how far they vary or agree with our own. The *Italian* writers agree with us, that the contract in queſtion is conditional, and that the riſk is the very eſſence and main ſpring of the whole. But ſtill they inſiſt and contend, that it is not lawful for the aſſured, *by their own act*, to break the contract; and that in ſuch a caſe, the inſurer is not obliged to return the premium. They hold indeed, that if the voyage be put an end to by any accident, ſuch as the ſhip being burnt, Cowp. 668.

Roccus Not. 15. 82. 88.

or

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or by publick authority; or if more goods were *bonâ fide* inſured than were actually on board: in the former caſes, the whole; and in the latter, a proportional part of the premium ſhould be returned. But if a man ſay he has goods on board, and inſure them, knowing that he has none, they aſk this queſtion: "An aſſecurator teneatur reſtituere pretium, eo "quod in navi non fuerunt merces? Videbatur aſſecurator "teneri ad reſtitutionem pretii recepti: ſed in contrarium eſt "veritas, quod non ſolum non teneatur pretium reſtituere, "imo poſſit patere illud; et ratio eſt, quia licet emptio pe- "riculi non teneat in præjudicium promiſſoris, tamen in "ejus favorem, et in præjudicium aſſecurati falſa aſſertio "bene tenet."

Roccus Not. 11.

Santerna, part 3. n. 22.

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The *French* law-givers have, however, decided upon this point agreeably to our laws; and have accordingly, in the famous ordinances of *Lewis* the Fourteenth, inſerted an article declaring, that if the voyage is entirely broken up before the departure of the ſhip, *even by the act of the inſured*, the inſurance ſhall be void, and the underwriter ſhall return the premium, reſerving one half *per cent.* for his trouble. This article affords ſcope to *Valin*, the very learned commentator upon theſe ordinances, to point out the advantages which the inſured enjoys above the inſurer, in being thus able to put an end to the contract, even after it is ſigned, which the underwriter can by no means effect. Indeed, when we conſider that the premium is nothing more than the price of the perils, which the underwriters ought to run; and that the obligation to pay the premium contains this tacit condition, "I will pay "*if the inſurers run the riſk*;" it is perfectly conſiſtent with that principle, that when the riſk is not run, whatever be the cauſe, the premium is not due to the inſurers. Accordingly in *England*, it has always been the cuſtom, when the policy is cancelled, to return the premium, deducting one half *per cent.*

2 Emerigon, 153. Ord. of Lew. 14. tit. Aſſur. art. 37.

2 Val. 93.

Pothiér Not. 179.

Molloy, l. 2. c. 7. ſ. 12.

The generality of the rule here eſtabliſhed would ſeem to extend it even to caſes of fraud on the part of the inſured. But the laws of *France*, upon this ſubject, have declared, that the inſured

Ord. of Lew. 14. tit. Inſur. art 41.

inſured ſhall be obliged to reſtore to the inſurer, whatever he has received from him, and alſo to pay him double the premium. This queſtion relative to a return of premium, in caſes of fraud, was very fully diſcuſſed in the chapter of fraud, and all the caſes fully cited; to that chapter therefore I muſt now refer the reader.

Vide ante, c. 10. p. 215.

Some of the ſtatutes for preventing the exportation of wool, and other ſtaple commodities of the kingdom, and which, in order more effectually to prevent ſuch exportation, have declared policies of inſurance on thoſe articles to be null and void, have enacted that the premium ſhall not be reſtored to the inſured.

See ante, ch. 13. p. 249.

When a policy is void, being made without intereſt, contrary to the ſtatute of the 19 *Geo.* the Second, *if the ſhip has arrived ſafe*, the court will not allow the inſured to recover back the premium; according to the old rule of law, *in pari delicto potior eſt conditio poſſidentis.* But in the deciſion of the caſe, in which this doctrine was held, the court ſeemed to rely much upon the diſtinction of contracts executed and executory: that this was a contract *executed*, the ſhip having arrived before the demand was made; but when a contract *executory* is to be reſcinded, it can only be done upon the equitable terms of putting all parties in their original ſituation. Mr. Juſtice *Willes* in this caſe differed in opinion from the reſt of the court, for reaſons delivered by the learned judge, and which will appear in their proper place.

19 Geo. II. c. 37. Vide ſupra, c. 14.

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Doug. 471.

The plaintiffs had lent to *Lawſon*, captain of the *Lord Holland Eaſt Indiaman*, 26,000 *l.* for which he had given them a common bond, in the penal ſum of 52,000 *l.* While he was with his ſhip at *China*, the plaintiffs got a policy of inſurance, underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning "the adventure, *upon the goods* from the loading thereof on "board the ſaid ſhip at *Canton* in *China*, &c. and *upon the ſaid* "*ſhip*, from and immediately following her arrival at *Canton*, "valued at 26,000 *l.* being the amount of Captain *Patrick* "*Lawſon's*

Lowry and another v. Bourdieu, Doug. 468. Vide ante, p. 272.

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" *Lawſon*'s common bond, payable to the parties as ſhall be " deſcribed on the back of this policy: and it bears date the " 16th day of *December* 1775; and in caſe of a loſs, *no other* " *proof of intereſt to be required than the exhibition of the ſaid* " *bond: warranted free from average and without benefit of ſal-* " *vage to the inſurer.*" At the head of the ſubſcriptions was written, " *On a bond as above expreſſed.*" Captain *Lawſon* ſailed from *China*, and arrived ſafe with his privilege (as it is called) or adventure, in *London*, on the firſt of *July* 1777, none of the events inſured againſt having happened. The receipt of the premium was acknowledged on the back of the policy. The inſured brought this action for a return of the premium, on the ground that the policy being without intereſt, the contract was void. The cauſe came on before Lord *Manſfield*, at *Guildhall*, when his Lordſhip was of opinion, that the policy was a gaming policy, prohibited by the ſtatute of 19 *Geo.* 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior eſt conditio poſſi-*

[374] *dentis*, was applicable to the caſe, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his Lordſhip's directions; but, the next morning, he expreſſed a doubt as to the propriety of his opinion, becauſe the money had been paid upon an executory agreement, which could never have been completed. A new trial was then moved for and fully argued.

Lord *Manſfield*.—" It is certainly true, in many inſtances, that firſt thoughts are beſt. I am now very much inclined to my firſt opinion. There are two ſorts of policies of inſurance: mercantile and gaming policies. The firſt ſort are contracts of indemnity, and of indemnity only; and from that principle a great variety of deciſions and conſequences have followed. The ſecond ſort may be the ſame in form; but in them there is no contract of indemnity; becauſe there is no intereſt on which a loſs can accrue. They are mere games of hazard; like the caſt of a die. In the preſent caſe, the nature of the inſurance is known to both parties. The plaintiffs ſay; " We mean to game; but we give our reaſon for " it; Captain *Lawſon* owes us a ſum of money, and we

" want

"want to be ſecure, in caſe he ſhould not be in a ſituation "to pay us." It was a hedge, but they had no intereſt; for, if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiffs would have been entitled to recover the amount of the bond from *Lawſon*. This then is a gaming policy, and againſt an act of parliament; and therefore it is clear that the court will not aſſiſt either party: according to the well known rule that *in pari delicto*, &c. Not that the defendant's right is better than that of the plaintiffs, but they muſt draw their remedy from pure fountains. I have returned to my old opinion; ſometimes you miſs the mark, by taking too long an aim."

Mr. Juſtice *Willes*.—"I ſhall make no apology for differing from the reſt of the court in a caſe where ſuch great abilities have entertained two different opinions. The premium has been paid, and yet no riſk run; for the policy was void from the beginning, and the inſured could not have recovered from the underwriters if the ſhip had been loſt. But I cannot think it a gaming policy. It does not appear to me that the parties had any idea they were entering into an illegal contract. The [375] whole was diſcloſed, and they *thought* there was an intereſt. This was a miſtake; but it is a new point of law. The caſe, cited from Precedents in Chancery, is not, perhaps, deciſive, but it goes a great way; and it would be very hard that a party ſhould loſe that which he has paid under a mere miſtake. I think, in conſcience, the defendant ought to refund the premium." Vide ante, ch. 10. p. 216.

Mr. Juſtice *Aſhhurſt*.—"I am clear that there ought not to be a new trial. A policy of inſurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which ſhews deciſively, that this was a gaming policy."

Mr. Juſtice *Buller*.—"It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any miſtake in matter of *fact*. If the law was miſtaken, the rule applies, that *ignorantia juris non excuſat*. This was a mere gaming policy, without intereſt. There

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There is a found diſtinction between contracts executed and executory, and if an action is brought with a view to reſcind a contract, you muſt do it while the contract continues executory, and then it can only be done on the terms of reſtoring the other party to his original ſituation. There was a caſe of *Walker* v. *Chapman*, ſome years ago in this court, where a ſum of money had been paid in order to procure a place in the *Cuſtoms*. The place had not been procured, and the party who had paid the money, having brought his action to recover it back; it was held that he ſhould recover, becauſe the contract remained executory. So, if the plaintiffs in the preſent caſe had brought their action, before the riſk was over, and the voyage finiſhed, they might have had a ground for their demand; but they waited till the riſk, ſuch as it was, (not indeed, founded in law, but reſting on the honour of the defendant), had been completely run. It makes no difference whether the premium was paid before the voyage or after it." The rule was diſcharged.

Andree v. Fletcher, 3 Term R. 266. See ante p. 279. [376]

And very lately it has been held upon the authority of *Lowry* v. *Bourdieu*, as not being diſtinguiſhable from it, that an action for money had and received will not lie to recover back the premium of a re-aſſurance void by the ſtatute of 19 *Geo.* 2. *ch.* 37.

Lord *Mansfield*, after the rule was diſcharged in *Lowry* v. *Bourdieu*, ſaid, he deſired it might not be underſtood, that the court held, that, in all caſes where money has been paid on an illegal conſideration, it cannot be recovered back. That in caſes of oppreſſion, when paid, for inſtance, to a creditor to induce him to ſign a bankrupt's certificate, or upon an uſurious contract, it may be recovered, for, in ſuch caſes, the parties are not *in pari delicto*.

That the court, in the caſe of *Lowry* v. *Bourdieu*, proceeded upon the diſtinction between contracts executed and executory, is evident not only from Mr. Juſtice *Buller*'s opinion, but is, in ſome meaſure, confirmed by what fell from Lord *Mansfield*, upon a ſubſequent occaſion, when this caſe was cited; al-

though it muſt be confeſſed, that the caſe about to be quoted, which was only decided ſuddenly at *niſi prius*, is a good deal ſhaken by the ſubſequent deciſion of *Andree* v. *Fletcher*.

Wharton v. De la Rive, Mich. vac. 1782, at Guildhall.

It was an action brought upon two wagers: one of 26*l.* 5*s.* to 100*l.* the other of 13*l.* 2*s.* 6*d.* to 30*l.* that the colonies of *North America* would be admitted or acknowledged independent ſtates, by ſome public official act or inſtrument made or executed, on the part of the king or government of *France*, at ſome time on or between the 1ſt of *February* and the 1ſt of *April* 1778, both days incluſive. The defendant pleaded *non aſſumpſit*. Upon the opening of this caſe, Lord *Mansfield* directed the plaintiff to be non-ſuited. But the counſel for the plaintiff inſiſted, that he was entitled to a verdict for the premium on the general count in the declaration, *for money had and received to his uſe*, which his Lordſhip permitted, on the ground of the contract being void, and of the defendant having money in his hands, which he ought not to retain. For the defendant it was ſaid, that he was entitled to keep the premium; and the caſe of *Lowry* v. *Bourdieu* was cited; but Lord *Mansfield* thought it did not apply, as in that caſe the riſk had been run. The point there decided was, that an inſurance being made without intereſt, and the premium paid, the inſured ſhall not recover back the premium, after the ſhip has arrived ſafe. And this upon the diſtinction, that the contract, though not a legal one, *was executed* before the relief was applied for, and no longer *executory*.

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Mackenzie and another v. Duff, B. R. Hilary T. 1799.

In a late caſe, the aſſured, having been nonſuited at the trial on the ground that the goods inſured were prohibited, and that the ſhipment of them, under the circumſtances diſcloſed, was a violation of the acts of navigation, inſiſted that they were entitled to a return of premium; and a motion was made to ſet aſide the nonſuit. Had this caſe proceeded, a deciſion of the preciſe queſtion, whether the premium is recoverable in caſes of inſurance effected contrary to the ſtatute law of the realm, without reference to the diſtinction between contracts executed and executory, would probably have been obtained: but unfortunately the rule was diſcharged upon

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upon a collateral point, and the main queſtion therefore remained undecided.

From the various caſes upon the ſubject of return of premium, as well as from all that has already been ſaid, it will appear, that in the *Engliſh* law there are two general rules eſtabliſhed, which govern almoſt all caſes. The firſt is, that where the riſk has not been run, whether that circumſtance was owing to the fault, the pleaſure, or will, of the inſured, or to any other cauſe, the premium ſhall be returned. This rule has already been pretty fully diſcuſſed. Another rule is, that if the riſk has *once* commenced, there ſhall be *no* apportionment or return of premium afterwards. Hence in caſes of deviation, though the underwriter is diſcharged from his engagement; yet the riſk being once commenced, he is entitled to retain the premium (*a*). Though theſe rules are ſo plain and ſimple, that they ſeem to preclude all poſſibility of doubt or contention; yet there are few points in the law of inſurance, which have given riſe to a greater number of cauſes than thoſe which relate to the ſubject of this chapter.

Cowp. 668.

It ought, however, to be acknowledged, that leſs litigation has taken place in thoſe inſtances where the whole of the premium is either to be retained or reſtored, than in thoſe, where, from the nature of the agreement between the parties, or the nature of the voyage, the contract becomes diviſible, and the court can ſay, "a part of the premium ſhall be retained "for the riſk run, and part ſhall be returned, as the riſk has "never commenced." This ſeems to be a refinement upon the rules juſt eſtabliſhed; but it muſt, at the ſame time, be admitted, that *when it can be accompliſhed*, it is a refinement perfectly conſiſtent with equity and good conſcience. The one rule has provided, that if the riſk be once begun, there ſhall be no return: but the other rule has ſaid, and equity has alſo ſaid, that a man ſhall not be paid for a riſk which he has never incurred;

3 Burr. 1240.

(*a*) In the caſe of *Hogg* v. *Horner*, (ante ch. 17.) Lord *Kenyon* being of opinion that there was a deviation, it was inſiſted that the aſſured had a right to return of premium; but Lord *Kenyon* thought there was an inception of the riſk *or*, and the contract being entire, there could be no return of premium.

curred; from whence the deduction is eaſy and natural, that if there are two diſtinct points of time, or, in effect, two voyages either in the contemplation of the parties or by the uſage of trade, and only one of the two voyages was made, the premium ſhall be returned on the other, although both are contained in one policy.

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The firſt time in which this doctrine was conſidered at any length, was in a caſe which came before the court of King's Bench, in the year 1761.

Stevenſon v. Snow, 3 Burr. 1237. and 1 Black. Rep. 318. S. C.

It was a ſpecial caſe reſerved at a trial at *niſi prius*, before Lord *Mansfield*, in *London*, upon an action for money had and received to the plaintiff's uſe, brought by the plaintiff, the inſured, againſt the defendant, the inſurer, for a return of part of the premium. It was an inſurance upon a ſhip, at five guineas *per cent.* loſt or not loſt, *at and from London to Halifax, in Nova Scotia, warranted to depart with convoy from Portſmouth*, for the voyage, that is to ſay, the *Halifax* or *Louiſburgh* convoy. Before the ſhip arrived at *Portſmouth* the convoy was gone. Notice of this was immediately given by the inſured to the underwriter; and at the ſame time he was alſo deſired either to make the long inſurance, or to return part of the premium. The jury find that the uſual ſettled premium from *London* to *Portſmouth* is one and a half *per cent.* They alſo find that it *is uſual* for the underwriter, in ſuch like caſes, to return part of the premium; but the *quantum* is uncertain: (And the *quantum* muſt in its nature be uncertain, becauſe it depends upon uncertain circumſtances.) It is ſtated, that the plaintiff made an offer to the defendant of allowing him to retain one and a half *per cent.* for the riſk he had run on ſuch part of the voyage as was performed under the policy, viz. from *London* to *Portſmouth.*

Lord *Mansfield.*—"I had not at the trial, nor have now, the leaſt doubt about this queſtion, myſelf. Theſe contracts are to be taken with great latitude: the ſtrict letter of the contract is not to be ſo much regarded, as the object and intention of it. Equity implies a condition, "that the inſurer ſhall not receive

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the price of running a risk, if he run none." This is a contract without any consideration, as to the voyage from *Portsmouth to Halifax*; for he intended to insure that part of the voyage, as well as the former part of it, and has not. Consequently the insured received no consideration for this proportion of his premium: and then this case is within the general principle of actions for money had and received to the plaintiff's use. I do not go upon the usage: for the usage found is only that in like cases, it is usual to return a part of the premium, without ascertaining what part. If the risk is not run, though it is by the neglect, or even the fault of the party insuring, yet the insurer shall not retain the premium. It has been objected, that the voyage being *begun* and part of the risk being already run, the premium cannot be apportioned. But I can see no force in this objection. This is not a contract so entire, that there can be no apportionment: for there are two parts in this contract: and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages. The practice shews, that it has been usual, in such like cases, to return a part of the premium, though the *quantum* be not ascertained. And indeed, the *quantum* must vary as circumstances vary: so that it never can have been fixed with any precise exactness. But though the *quantum* has not been ascertained; yet the principle is agreeable to the general sense of mankind."

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Mr. Justice *Denison*.—"It is most equitable that the defendant should only retain the premium for such part of the voyage, as he has run any risk: the insured has a right to have the other part restored to him. This is agreeable to the general principle of actions for money had and received to the use of the plaintiff: where the defendant has no right to retain, he must refund it."

Mr. Justice *Foster*.—"There is no consideration for the remainder of the premium; for in the voyage from *Portsmouth* to *Halifax*, no risk was run by the insurer, who only insured the voyage *with* convoy: therefore he has no right to retain the premium for this."

Mr. Justice

Mr. Juſtice *Wilmot* declared his concurrence moſt clearly and ſtrongly. Theſe kinds of contracts, he obſerved, are, by the writers on this head, called *contractus innominati*; and the rule, which they lay down concerning them, is, that they are to be determined *ſecundum bonum et æquum*. The jury have here found an uſage to return part of the premium in ſuch caſes; which is a ſtrong proof of the equity of the thing: and nothing can be more juſt and reaſonable. If the riſk was once begun, the inſured ſhall not deviate or return back, and then ſay, "I "will go no further under this contract, but will have my pre- "mium returned." But upon this policy there are two diſtinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other not at all entered upon. It was a conditional contract: and the ſecond voyage was not begun; therefore the premium muſt be returned, for upon this ſecond part of the voyage, the riſk never took place at all. This is agreeable to what the writers upon the ſubject lay down; and is the right and juſtice of the caſe. The *poſtea* was delivered to the plaintiff (*a*).

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Some years afterwards, the principle eſtabliſhed in the foregoing caſe was attempted to be applied to one, which it did not at all reſemble. For the following caſe was an inſurance for twelve months at 9 *l. per cent.*; and becauſe the ſhip was captured within two months after the contract was made, a return of premium was demanded, upon the principle of *Stevenſon* v. *Snow*. But the contract in this caſe was entire; the premium was a groſs ſum ſtipulated and paid for twelve months; and the parties, when they made the contract, had no intention or thought of a ſubſequent diviſion, or apportionment.

The caſe was thus:

It was an action, in the uſual form, for money had and received to the plaintiff's uſe, for a return of part of the premium. The cauſe was tried at *Guildhall*, before Lord *Mansfield*, when,

Tyrie v Fletcher, Cowp. 666.

(*a*) This caſe was lately much conſidered in a caſe of *Rothwell* v. *Cooke*, 1 Boſ. & Pul. Rep. p. 172. in the Common Pleas, but no deciſive judgment delivered on the ſubject.

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by conſent, a verdict was found for the plaintiff, ſubject to the opinion of the court upon the queſtion, Whether, under the circumſtances of the caſe, a proportionable part of the premium ought to be returned or not. If the court ſhould be of opinion that a proportionable part of the premium ought not to be returned, then a nonſuit was to be entered. It now came before the court upon a rule to ſhew cauſe, why a nonſuit ſhould not be entered; and the caſe, as it appeared from the report, was ſhortly this. The policy was on the ſhip *Iſabella*, at and from *London*, to any port or place, where or whatſoever, *for twelve months*, from the 19th of *Auguſt* 1776, to the 19th of *Auguſt* 1777, both days inclufive, at 9 *l. per cent.* warranted free from captures and ſeizures by the *Americans*, and the conſequences thereof. In all other reſpects, it was in the common form,

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againſt all perils of the ſea, *&c.* The ſhip ſailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Lord *Mansfield*.—" It was very proper to ſave this caſe for the opinion of the court, becauſe in all mercantile tranſactions, certainty is of much more conſequence, than which way the point is decided; and more eſpecially ſo, in the caſe of policies of inſurance: becauſe, if the parties do not chuſe to contract according to the eſtabliſhed rule, they are at liberty as between themſelves to vary it. This caſe is ſtript of every authority. There is no caſe or practice in point; and therefore we muſt argue from the general principles applicable to all policies of inſurance. And I take it, there are two general rules eſtabliſhed, applicable to this queſtion: the firſt is, that where the riſk has not been run, whether its not having been run was owing to the fault, pleaſure, or will of the inſured, or to any other cauſe, the premium ſhall be returned; becauſe a policy of inſurance is a contract of indemnity. The underwriter receives a premium for running the riſk of indemnifying the inſured, and to whatever cauſe it be owing, if he do not run the riſk, the conſideration, for which the premium or money was put into his hands, fails, and therefore, he ought to return it. Another rule is, that if the riſk has *once* commenced, there ſhall be no apportionment or return of premium afterwards.

For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage; yet, if it has commenced, though it be only for 24 hours or leſs, the riſk is run; the contract is for the whole entire riſk, and no part of the conſideration ſhall be returned: and yet, it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the *Eaſt Indies* agreeably to the terms of the policy in this caſe, and had been taken 24 hours after the riſk was begun, by an *American* captor, there is not a colour to ſay, that there ſhould have been a return of premium. So much then is clear; and indeed, perfectly agreeable to the ground of determination in the caſe of *Stevenſon* v. *Snow*. For in that caſe, the intention of the parties, the nature of the contract, and the conſequences of it, *ſpoke* manifeſtly *two* inſurances, and a *diviſion* between them. The firſt object of the inſurance was from *London* to *Halifax:* but if the ſhip did not depart from *Portſmouth* with convoy, (particularly naming the ſhip appointed to be convoy), then there was to be no contract from *Portſmouth* to *Halifax:* why then, the parties have ſaid, "we make a contract from *London* to *Halifax*, but on a certain contingency "it ſhall only be a contract from *London* to *Portſmouth*." That contingency not happening, reduced it in fact to a contract from *London* to *Portſmouth* only. The whole argument turned upon that diſtinction. Mr. *Yates*, who was counſel for the plaintiff, put it ſtrongly upon that head; and all the judges, in delivering their opinions, lay the ſtreſs upon the contract compriſing two diſtinct conditions, and conſidering the voyage as being in fact two voyages: and it was the equitable way of conſidering it; for, though it was at firſt conſolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Juſtice *Wilmot* put it particularly upon that ground; but it was the opinion of the whole court. There was an uſage alſo found by the jury in that caſe, that it was cuſtomary to return a proportionable part of the premium in ſuch like caſes, but they could not ſay *what* part. The court rejected this as a uſage for *uncertainty;* but they argued from it, that there being ſuch a cuſtom, plainly ſhewed the general ſenſe of merchants, as to the propriety of returning a part of the premium in ſuch caſes: and there can be no doubt of the

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reaſonableneſs of the thing. There has been an inſtance put of a policy where the meaſure is by time, which ſeems to me to be very ſtrong, and appoſite to the preſent caſe; and that is an inſurance upon a man's life for twelve months. There can be no doubt but the riſk there is conſtituted by the meaſure of time, and depends entirely upon it: for the underwriter would demand double the premium for *two* years, that he would take to inſure the ſame life for *one* year only: in ſuch policies there is a general exception againſt ſuicide. If the perſon puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breaſt, that part of the premium ſhould be returned. A caſe of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, provided the ſhip ſhall ſail on or before the 1ſt of *Auguſt*:" and Mr. *Wallace* conſiders in that caſe, that the whole policy would depend upon the ſhip ſailing before the ſtated day. I do not think ſo. On the contrary, I think with

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Mr. *Dunning*, that cannot be. A loſs in port *before* the day appointed for the ſhip's departure, can never be coupled with a contingency after the day: but if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of the determination of *Stevenſon* v. *Snow*: and that there were two parts, or contracts of inſurance with diſtinct conditions. The firſt is, I inſure the ſhip in port, provided ſhe is loſt in port, before the 1ſt of *Auguſt*: and 2dly, if ſhe be not loſt in port, I inſure her then during her voyage, from the 1ſt of *Auguſt* till ſhe reaches the port ſpecified in the policy. The loſs in port muſt happen, before the riſk upon the voyage could commence: and *vice verſâ*; the riſk in port muſt ceaſe the moment the riſk upon the voyage began. Let us ſee then, what the agreement of the parties is in the preſent caſe. They might have inſured from two months to two months, or in any leſs or greater proportion, if they had thought proper ſo to do: but the fact is, that they have made *no diviſion of time at all*; but the contract entered into is one entire contract from the 19th of *Auguſt* 1776, to the 19th of *Auguſt* 1777; which is the ſame as if it had been expreſsly ſaid by the inſured, "If you the underwriter

" will inſure me for twelve months, I will give you an *entire* ſum; but I will not have any apportionment." The ſhip ſails, and the underwriter runs the riſk for *two* months. No part of the premium then ſhall be returned. I cannot ſay, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived."

Mr. Juſtice *Aſton*.—" This caſe depends upon the words of the policy: and I am of opinion, it is one entire contract at a certain groſs ſum of 9*l. per cent.* for a certain period of time, *viz.* twelve months; and that no diviſion is to be implied. The determination in *Stevenſon* v. *Snow* went expreſsly upon this conſideration, that there were *two diſtinct voyages*, and no conſideration received by the inſured for the premium upon the ſecond voyage: and there certainly was not; for there never was any point of time, when any riſk was run from *Portſmouth*. In *Bond* v. *Nutt*, the loſſes inſured againſt were diſtinct, and unconnected with each other. 1ſt, A loſs of the ſhip in port, if any ſhould happen there. 2dly, A loſs in the paſſage home, provided ſhe ſailed on a certain day. The riſk in ſome policies may be diſtinct and diviſible in its nature. In the caſe of an inſurance on a life, the ſum is entire, and time is entire for the whole year. So in this caſe I think the contract is one entire contract: and therefore that there ought to be no return of premium."

Vide ante, c. 18. p. 328.

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Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Per Curiam. Let a nonſuit be entered.

In a ſubſequent caſe, the court of King's Bench adopted the ſame rule of deciſion, where the ſhip was inſured for 12 months, and the riſk ceaſed at the end of two. A diſtinction was attempted to be made, becauſe in this caſe, the whole premium 18*l.* was acknowledged to be received from the inſured *at the rate of* 15 *ſhillings per month:* and this, it was inſiſted, evidently ſhewed the parties intended the riſk to continue only from month to month. This objection was, however, over-ruled; the court being of opinion, that the caſe laſt reported decided

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this; and that the 15 *s.* per month was only a mode of computing the groſs ſum. The caſe was in ſubſtance as follows:

Loraine v. Thomlinſon, Dougl. 585.

It was an action tried before Lord *Loughborough*, at the aſſizes for the county of *Northumberland*, in which the plaintiff declared,—That the defendant, in conſideration that the plaintiff at his requeſt had underwritten ſeveral policies of inſurance as to certain ſums of money therein ſubſcribed againſt his name, on the ſhips, merchandizes, and other things therein reſpectively ſpecified, without receiving the full premiums therein mentioned, undertook and promiſed to pay the plaintiff ſo much money, as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40 *l.* There was another count for 40 *l.* for money had and received by the defendant to the plaintiff's uſe. The defendant pleaded non aſſumpſit as to all except the ſum of 3 *l.* upon which plea iſſue was joined; and as to the 3 *l.* he pleaded a tender, and paid that ſum into court. Upon the plea of tender, iſſue was alſo joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other iſſue, for the ſum of 15 *l.* ſubject to the opinion of the court, whether he
[385] was entitled to recover that ſum of 15 *l.* or the ſum of 3 *l.* only, upon a caſe, which ſtated, in effect, as follows: The plaintiff had underwritten 200 *l.* on a policy effected at *Newcaſtle* (which was ſet forth *verbatim* in the caſe), whereby the ſhip the *Chollerford* was inſured, againſt capture by the enemy for *twelve months*, in the coaſting trade between *Leith* and the *Iſle of Wight*; beginning the 13th of *March* 1779, and ending the 13th of the ſame month, 1780. In the body of the policy it was ſtated, "That the aſſurers confeſſed themſelves paid the "conſideration due unto them by the aſſured, *at and after the* "*rate of* 15 *s. per cent. per month.* At the bottom, oppoſite "to the plaintiff's ſubſcription, was written, premium re- "ceived 16th of *March* 1779;" and on the back was indorſed, "*Newcaſtle*, 15th of *March* 1779, Mr. *John Gaul* "*Tomlinſon*, on his ſhip the *Chollerford*, himſelf maſter, *for* "*twelve months*, in the coaſting trade, at and between *Leith* "and the *Iſle of Wight*, beginning the 13th of *March* 1779, "and ending the 12th of *March* 1780. Enemy only. *At*

"15 *s.*

"15 *s. per cent. per month*, 18 *l.*" The premium was not paid, though expreſſed in the policy to have been paid, it being the uſage in *Newcaſtle* not to pay the premium at the time of making the inſurance; but at various times after the policies are effected, and ſometimes, not till twelve months after. The ſhip was loſt in a ſtorm, within the firſt two of the twelve months for which the inſurance was made, and the defendant tendered to the plaintiff 3 *l.* as the premium for two months. The caſe then ſtates contradictory evidence given by witneſſes on both ſides, as to what had been done at *Newcaſtle* in ſimilar caſes; but which I forbear to ſet down; becauſe the court of King's Bench was afterwards of opinion, that it ought not to have been received.

After the counſel for the defendant had been heard, the plaintiff's counſel was prevented by the court from proceeding.

Lord *Mansfield*.—"This is a mere queſtion of conſtruction, on the face of the inſtrument, and therefore parole evidence ſhould not have been admitted to explain it. It is an inſurance for twelve months, for one groſs ſum of 18 *l.* They have calculated this ſum to be at the rate of 15 *s. per* month. But what was to be paid down? Not 15 *s.* for the firſt month, and ſo from month to month; but 18 *l.* at once. Two caſes have been mentioned. *Stevenſon* v. *Snow* was decided on the ground of there *being two voyages*. *Tyrie* v. *Fletcher* is directly in point againſt the defendant. There are two principles in theſe caſes; 1ſt, If the riſk has never begun, the whole premium is to be returned, becauſe there was no conſideration: 2d, When the riſk has begun, there ſhall never be a return, although the ſhip ſhould be taken in 24 hours."

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Mr. Juſtice *Aſhhurſt*.—"The 15 *s.* per month is only a mode of computing the groſs ſum."

Mr. Juſtice *Willes*, and Mr. Juſtice *Buller* concurring in opinion, the *poſtea* was delivered to the plaintiff.

The two laſt caſes were inſurances upon time; but from the principles laid down in them, and in the former caſe of *Stevenſon*

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venſon v. *Snow*, it ſeems perfectly clear, that when the contract is entire, whether it be for a ſpecified time, *or for a voyage*, there ſhall be no apportionment or return, if the riſk has once commenced. And therefore where the premium is entire in a policy on a voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the riſk is to end, nor any uſage eſtabliſhed upon ſuch voyages; although there be ſeveral diſtinct ports, at which the ſhip is to ſtop, yet the voyage is one, and no part of the premium ſhall be recoverable.

Bermon v. Woodbridge, Dougl. 781.

A rule had been obtained to ſhew cauſe why there ſhould not be a new trial in a caſe, which had come on before Lord *Mansfield* at *Guildhall*, when the jury found a verdict for the defendant. The caſe was this: It was an action on a policy of inſurance, on the *French* ſhip *Le Pactole*, and her cargo, and the voyage was deſcribed in the policy in the following words: "At and from *Honfleur to the coaſt of Angola, during her ſtay* "*and trade there, at and from thence to her port or ports of diſ-* "*charge in St. Domingo, and at and from St. Domingo back to* "*Honfleur.*" The clauſe reſpecting the premium was as follows: "Slaves valued at 800 *livres Tournois per* head; the ſhip "at 1450*l.* ſterling; other goods, &c. as intereſt may appear; "*at a premium of* 11 *per cent.*" The ſhip ſailed to *Angola* and from thence, after ſtaying ſome time there, to the *Weſt Indies*. On her way to *Angola*, ſhe put in at *Cayenne*, on the coaſt of *America*, and from *Cayenne* went to *Martinico*, confeſſedly out of the way to *St. Domingo*. In this cauſe, the firſt queſtion was a queſtion of fact, not material to our preſent enquiry, viz. whether the courſe taken was a deviation, or not, from the voyage inſured. After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counſel for the plaintiff inſiſted, that as there was a count in the declaration for money had and received, the voyage inſured ought to be conſidered as compoſed of three diſtinct parts or voyages; namely, from *Honfleur* to *Angola*; 2dly, from *Angola* to *St. Domingo*; and 3dly, from *St. Domingo* to *Honfleur*; and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the

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premium

premium ought to be apportioned, and a return made of that part which was paid to inſure the riſk from *St. Domingo* to *Honfleur*. Lord *Mansfield* took the opinion of the jury upon that point alſo; and they were clear there ought to be no return. Next day, however, his Lordſhip ſaid, he had turned that queſtion in his mind, and that he entertained ſome doubts upon it, and as it was a queſtion of law, deſired Mr. *Lee* to move for a new trial on that ground. It was, however, afterwards moved on both grounds; namely, on the queſtion of fact, whether the deviation was wilful: and 2dly, On the queſtion of law, whether, ſuppoſing it wilful, there ought to be a return of premium.—Theſe queſtions were fully diſcuſſed by three advocates on each ſide; and the court alſo took time to deliberate upon them: after which the Lord Chief Juſtice delivered the unanimous opinion of the whole court. CHAP. XIX.

Lord *Mansfield*, after ſtating that, upon the queſtion of fact, they were perfectly ſatisfied with the verdict of the jury, proceeded thus: "If, however, the plaintiff ſhould ſucceed on the ſecond point, the determination would virtually allow him a new trial on the whole of the cauſe, becauſe no ſpecial caſe was reſerved. But, on the fulleſt conſideration, and after looking into all the caſes, (though my opinion has fluctuated), we are now all clearly of opinion, that there ought not to be any return. The queſtion depends upon this: Whether the policy contains one entire riſk on one voyage, or whether it is to be ſplit into ſix different riſks; for, by ſplitting the words, and taking "at" and "from" ſeparately, it will make ſix, viz. 1ſt, *At Honfleur*; [388] 2d, *From Honfleur to Angola*; 3d, *At Angola*, &c. The principles are clear. Where the riſk has never begun, there muſt be a return of premium; and if the voyages, in this caſe, are diſtinct, the riſk from *St. Domingo* to *Honfleur* never began. On the other hand, if the riſk has once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exceptions of ſuicide, and the hands of juſtice, if the party commit ſuicide, or is executed in twenty-four hours, there ſhall be no return. The caſe is the ſame, if a voyage inſured is once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the

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the whole, without diviſion: it is eſtimated on the whole at 11*l.* *per cent.* And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the inſurance. The argument muſt be, that, if the ſhip had been taken between *Honfleur* and *Angola*, there muſt have been a return. By an implied warranty, every ſhip muſt be ſea-worthy when ſhe firſt ſails on the voyage inſured, but ſhe need not continue ſo throughout the voyage; ſo that, if this is one entire voyage, if the ſhip was ſea-worthy when ſhe left *Honfleur*, the underwriters would have been liable, though ſhe had not been ſo at *Angola*, &c.; but according to the conſtruction contended for on behalf of the plaintiff, ſhe muſt have been ſea-worthy, not only at her departure from *Honfleur*, but alſo when ſhe ſailed from *Angola*, and when ſhe ſailed from *St. Domingo*. The caſes of *Stevenſon* v. *Snow* and *Bond* v. *Nutt*, were quite different from this. They depended upon this, that there was a contingency ſpecified in the policy, upon the not happening of which the inſurance would ceaſe. In *Stevenſon* v. *Snow*, it depended on the contingency of the ſhip ſailing with convoy from *Portſmouth*, whether there ſhould be an inſurance from that place. This neceſſarily divided the riſk, and made two voyages. In *Bond* v. *Nutt*, it was held, that there were two riſks, upon the ſame principle. "*At Jamaica*" was one; the other, viz. the riſk "*from Jamaica*," depended on the contingency of the ſhip having ſailed *on or before the firſt of Auguſt: that* was a condition precedent to the inſurance on the voyage from *Jamaica* to *London*. The two caſes of *Tyrie* v. *Fletcher*, and *Loraine* v. *Thomlinſon*, are very ſtrong, for, if you could apportion the premium in any caſe, it would be in inſurances upon time. Therefore, on very full conſideration, we think this one entire riſk, one voyage, and that there can be no return of premium." The rule was diſcharged.

Vide ante, c. 12.

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Meyer v. Gregſon, B. R. Eaſt. 24 Geo. III.

Accordingly in another action for return of premium, tried before Mr. Juſtice *Willes*, on the Northern circuit, where a verdict had been given for the plaintiff, upon a motion to ſet aſide the verdict, and to enter a nonſuit, a deciſion, ſimilar to that of *Bermon* v. *Woodbridge*, was made. The inſurance was "*At*

" *At and from Jamaica to Liverpool, warranted to ſail on or before* " *the firſt of Auguſt, premium twenty guineas per cent. to return* " *eight, if ſhe ſailed with convoy.*" The ſhip did not ſail till *September* and was loſt. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid eight for the convoy into court, which was allowing four for the riſk run by the defendant *at Jamaica.*

Lord *Mansfield.*—" It would be endleſs to go into enquiries about the riſk at *Jamaica.* It appears on the evidence to be different on different ſides of the iſland. Beſides the parties have divided the riſk, with reſpect to convoy; for it is a premium of twenty guineas, to return eight, if ſhe ſail with convoy: but there is an abſolute warranty as to the ſailing, and nothing ſaid of the premium."

Mr. Juſtice *Willes* thought the premium ſhould be apportioned.

Mr. Juſtice *Aſhburſt* and Mr. Juſtice *Buller* agreed with Lord *Mansfield*, the latter obſerving, that as the parties have not conſidered it as two riſks, nor eſtimated the riſk at *Jamaica*, the court cannot do it for them. In all the inſurances from *Jamaica*, the policy runs " at and from;" and though in many inſtances the voyage has not begun, yet there never was an idea of the premium being returned, and that no uſage was found by the jury. The rule for entering the judgment of nonſuit was made abſolute.

I am aware that the deciſion in this caſe may ſeem to claſh with what fell from Lord *Mansfield*, in delivering his opinion in the caſe of *Tyrie* v. *Fletcher*; in which he put a ſuppoſed caſe of an inſurance " at and from, *provided* the ſhip ſhall ſail on or before the firſt of *Auguſt.*" In ſuch a caſe, his Lordſhip obſerved, *as then adviſed*, he ſhould incline to think it a diviſible riſk. In this place, it would be ſufficient to obſerve, in anſwer to ſuch an objection, that the opinion then delivered by Lord *Mansfield* was a mere *obiter dictum* upon a point, ariſing only in the courſe of argument; in which caſe, the greateſt abilities

Vide ſupra.

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are

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are liable to miſtake. But his Lordſhip delivered that opinion, with a wiſe and prudent reſervation, that, *as at preſent adviſed*, he thought ſo and ſo: and it is no diſgrace to any man, however renowned for knowledge, to alter an opinion, upon mature deliberation. There is, however, one very obvious diſtinction, upon which the court relied much, between *Meyer* v. *Gregſon*, and the caſe put in *Tyrie* v. *Fletcher*: for in the latter, the inſured has uſed a moſt ſignificant word (*provided*) to mark the difference between the two parts of the riſk; "*at and* "*from, provided ſhe ſail, &c.*" In the former, the inſured as expreſsly provided for a return of premium, in caſe the ſhip ſails with convoy; why did he not uſe the ſame precaution, leſt ſhe ſhould not ſail by the day limited? Having done it in the one caſe, it is to be preſumed he did not mean to do it, or that the inſurer would not conſent that it ſhould be done, in the other: and as the parties had not divided the riſk themſelves, the court could not do it for them.

Gale v. Machell, B. R. Eaſt. 25 Geo. III.

In another caſe upon an inſurance "at and from any port "or ports in *Jamaica* to *London*, following and commencing "on her firſt arrival there, warranted to ſail with convoy "from the place of rendezvous to *Great Britain*," the ſame queſtions were again agitated. But as the counſel differed upon the evidence given at the trial, the main queſtion was not fully diſcuſſed by the court, but was ſent back to a new trial.

Long v. Allen, B. R. Eaſt. Term, 25 Geo. III.

The laſt caſe upon this ſubject was alſo an action for a return of the premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to ſail on or before the 1ſt of *Auguſt*, upon goods on board a ſhip called the *Jamaica*, at a premium of 12 guineas *per cent.*" The ſhip ſailed from *Jamaica* to *London* on the 31ſt of *July* 1782, but without any convoy for the voyage. At the trial before Lord *Mansfield*, the jury found a verdict for the plaintiff, ſubject to the opinion of the court upon a caſe, ſtating the facts already mentioned. In addition to which, they *expreſsly* find, "that it is the conſtant and invariable uſage "in an inſurance, at and from *Jamaica* to *London*, warranted

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"to

" to depart with convoy, or to ſail on or before the 1ſt of " *Auguſt*, when the ſhip does not depart with convoy, or ſails " after the 1ſt of *Auguſt*, to return the premium, deducting " one half *per cent.*"

Lord *Mansfield.*—" An inſurance being on goods warranted to depart with convoy, the ſhip ſails without convoy; and an action is brought to recover the premium. The law is clear, that if the riſk be commenced, there ſhall be no return. Hence queſtions ariſe of diſtinct riſks inſured by one policy or inſtrument. My opinion has been to divide the riſks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has ſometimes leaned againſt them. But where an expreſs uſage is found by the jury, the difficulty is cured. They offered to prove the ſame uſage as to the *Weſt Indies* in general; but I ſtopt them, and confined the evidence to *Jamaica.*" Vide Meyer v. Gregſon.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, concurred with his Lordſhip.

Mr. Juſtice *Buller.*—" The counſel for the defendant did right in his argument to make the chief queſtion, Whether parole evidence of this uſage ought to have been received? In mercantile caſes from Lord *Holt*'s time, and in poliſies of inſurance in particular, a great latitude of conſtruction as to uſage has been admitted. By uſage, places come within the policy, which are not expreſſed in words; uſage explains and even controuls the policy. The uſage here found by the jury is univerſal: and though in ſome caſes one half *per cent.* may be a ſmall premium for the riſk *at*; yet the underwriters are aware that it is ſo. In *Meyer* v. *Gregſon*, no uſage was found. Beſides in caſes of this kind, where every thing is left to the whim and caprice of a jury, I lean much againſt them. Here a general and certain uſage is found; and no inconvenience can reſult from it." The *poſtea* was delivered to the plaintiff.

From the tenor of all theſe caſes it ſhould ſeem, as Lord *Mansfield* ſaid in the caſe of *Long* v. *Allen*, that ſo many difficulties occur in apportioning the premium, that the courts

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courts are often obliged to decide againſt it, unleſs there be ſome uſage upon the ſubject. Even in the caſe of *Stevenſon* v. *Snow*, the jury found that it had been uſual to divide the riſk; and although the court rejected the uſage for uncertainty, becauſe it did not aſcertain what proportion of the premium ſhould be returned; yet they expreſsly ſay, that it ſerves to ſhew what the idea of the mercantile world is upon the ſubject. If, indeed, we look back to all the caſes reported in this chapter, we never find an apportionment take place, except in *Stevenſon* v. *Snow*, and *Long* v. *Allen*, on account of the difficulty, unleſs there be ſome uſage, as in thoſe caſes, to guide and direct the judgment of the court.

Vide ante, c. 18. Before this chapter is concluded, it will be proper to obſerve, that in the caſe of *Bond* v. *Nutt*, which was ſo often mentioned in the argument of the caſes upon apportionment, the queſtion never aroſe. In that caſe, the two material queſtions were, as may be ſeen by a reference to it in the two preceding chapters of this work, whether the ſhip had complied with a warranty of ſailing by a particular day: and whether in going to the place of rendezvous for convoy, ſhe was guilty of a wilful deviation. It was proper to mention this, to prevent miſconſtruction; and it was alſo taken notice of by Mr. Juſtice *Buller*, in the caſe of *Long* v. *Allen*.

CHAPTER THE TWENTIETH.

Of the Proceedings upon Policies of Inſurance.

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IN the preſent chapter, it is intended to point out in what manner, and by what form of legal proceeding, a man, who has inſured property, and has ſuſtained a loſs, is to recover againſt the underwriters upon the policy. We have formerly ſeen, that the Court of Policies of Inſurance fell into diſuſe, and the reaſons why it did ſo: ſince which period all queſtions of this nature have been decided by the uſual mode of trial, known to the laws and conſtitution of this country, namely, the trial by jury in the courts of common law. Caſes of this nature are not the ſubject of enquiry even in a court of Equity, becauſe the demand is plainly a demand at law; and the loſs and damage ſuſtained are as much the object of proof by witneſſes, as any other ſpecies of damage whatever. This was decided by a decree of Lord Chancellor *King*, whoſe opinion was afterwards confirmed by the Houſe of Lords.

Vide the Introduction.

In the year 1720, ſome merchants at *Oſtend* ſet up a trade to the *Eaſt Indies*; and amongſt others, one *James Maelcamp* equipped a ſhip, called the *Flandria*, for a voyage to *China*, wherein ſeveral perſons were concerned. *Maelcamp* had the care and direction of the ſhip, and gave receipts to the ſeveral perſons concerned, for the monies they paid, promiſing to be accountable to them for their reſpective proportions of the net profit of the voyage. Theſe tranſactions being carried on moſtly at *Oſtend* or *Antwerp*, the ſeveral perſons, who had a mind to be concerned in the undertaking, gave directions to their correſpondents at thoſe places, to pay *Maelcamp* what ſums they thought fit, and to take his receipts for the ſame. The appellants gave directions to one *Conninck* to pay ſeveral large ſums to *Maelcamp*, on account of the ſaid undertaking; and accordingly *Conninck* paid him divers ſums, amounting to 35,000 guilders, and took diſtinct receipts for the ſame, according to the proportion for which the appellants were concerned

De Ghetoff and others v. the Governor and Company of the London Aſſurance, 3 Brown's Parliament Caſes, 525.

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cerned therein: he alſo, by the order and direction of the appellants, and for their uſe or benefit, agreed with the reſpondents to inſure on the ſaid ſhip the *Flandria*, 5000*l.* and by a policy, dated the 26th day of *December* 1720, this inſurance was effected, at a premium of 12*l. per cent.* The ſhip ſailed from *Oſtend*, in order to proceed to *China*; but on her way was ſeized at *Bencoolen*, in the *Eaſt Indies*, by the governor, being an *Engliſh* ſettlement, and the ſhip and cargo were confiſcated. The appellants, upon notice of this event, applied to the reſpondents for payment of the 5000*l.* inſured, and produced to them the ſeveral receipts for their reſpective intereſts in the ſhip, and affidavits affirming the ſeveral ſums therein mentioned, to have been really and *bonâ fide* paid. But the reſpondents refuſing to pay, or make any ſatisfaction to the appellants, *they brought their bill in the Court of Chancery*, againſt the reſpondents, and the ſaid *Conninck*, praying, *that the reſpondents might be decreed to pay the appellants the ſaid ſum of* 5000*l. with intereſt*, according to their ſeveral and reſpective ſhares and proportions thereof. To this bill, the reſpondents put in a demurrer and anſwer, and to ſuch part of the bill, as ſought to compel them to pay the appellants the 5000*l.* or to make them any ſatisfaction for any loſs, which had happened to the ſhip, they demurred; and for cauſe of demurrer ſhewed, that if the policy of inſurance in the bill mentioned was forfeited, *a proper action at law lay to recover the money due thereupon*; and that the appellants, if they were entitled to ſuch relief as they prayed by their bill, might have their compleat and adequate remedy by an action at law, where ſuch matters were properly cognizable, and where the appellants ought to prove their intereſt in, and the loſs of the ſhip. The demurrer came on to be argued before Lord Chancellor *King*, when his lordſhip ordered it to ſtand over for two months till *Conninck's* anſwer ſhould come in; and if the appellants did not procure ſuch anſwer in two months, the demurrer was to be allowed. *Conninck* accordingly put in his anſwer within two months, and thereby admitted, that he made the aſſurance in his own name, in truſt and for the benefit of the appellants; but ſaid *he did not care to permit the appellants to bring any action againſt the reſpondents in his name*; he being adviſed, that if any ſuch action

action ſhould be brought, and they ſhould not prevail therein, he would be perſonally liable to pay all the coſts and charges occaſioned in conſequence thereof. In ſupport of the demurrer it was urged, that the appellants' demand was plainly a demand at law, as they had nothing to prove but their intereſt, and the loſs of the ſhip, which were facts proper to be tried by a jury. That there was no equity ſuggeſted by the bill, but a pretended difficulty to produce witneſſes: and that their truſtee refuſed to permit them to bring an action in his name: that the former objection might with equal reaſon be ſuggeſted in almoſt every caſe of a policy of inſurance; and the latter appeared manifeſtly to be thrown into the bill, merely to change the juriſdiction, and it was in a great meaſure falſified by the truſtee's anſwer, for he did not ſay that he ever refuſed, but only that *he did not care to permit his name to be made uſe of*. If bills of this kind were encouraged, it would be eaſy to bring all ſorts of property to be tried in a court of Equity.

Upon theſe reaſons, Lord *King* allowed the demurrer; and upon an appeal to the Houſe of Lords, after hearing counſel upon it, it was ordered and adjudged, that the ſame ſhould be diſmiſſed; and the order complained of, affirmed.

There may, it is true, be caſes, where an application to a court of Equity on the part of the inſured, is ſtrictly proper, and will be entertained. For inſtance, if the truſtee in a policy of inſurance do actually refuſe his name to the *ceſtui que truſt* in an action at law, there may be ſome pretence for going into a court of Equity, as Lord *Hardwicke* has once obſerved. Or, if from a concurrence of circumſtances, the perſons, whoſe teſtimony is requiſite to the deciſion of ſome diſputed facts, reſide abroad, the Court of Chancery will grant a commiſſion to examine thoſe witneſſes. But it is not upon a mere general truſt, or the looſe ſuggeſtions of any of theſe facts, that this extraordinary interpoſition will take place.

1 Atk. 547.
2 Atk. 359.

There are alſo caſes, in which the inſurers may go into equity, to obtain injunctions to ſtay the proceedings againſt them at

Chitty v. Selwin and Martin, 2 Atk. 359.

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at law: as in the laſt caſe mentioned, where the evidence of perſons abroad is requiſite for their defence; in which ſituation, they ſhall have a commiſſion to examine witneſſes abroad, and an injunction to ſtay proceedings at law in the mean time. Another ground for an application to a court of Equity, is a ſuſpicion of fraud on the part of the inſured, and of which I fear the chapter on fraud produces too many inſtances: in ſuch caſes the court will compel the party charged to make a full diſcloſure upon oath of all the circumſtances that are within his knowledge; and to deliver up all papers and documents, that are at all material to the queſtion. But except in theſe inſtances, all iſſues upon policies of inſurance muſt be tried in the courts of common law. Even if the parties, by a clauſe in the policy, agree that in caſe of a diſpute, it ſhall be referred to arbitration, that will not be a ſufficient bar to an action at law; provided no reference has been in fact made, nor is depending.

Vide c. 10.

Kill v. Holliſter, 1 Wilſ. 129. In Thompſon v. Charnock, 8 Term R. 139. it was held that a covenant in a deed to refer all matters is not ſufficient to ouſt the courts of law and equity of their juriſdiction

Thus in an action upon a policy of inſurance it appeared, that a clauſe was inſerted, that in caſe of any loſs or diſpute about the policy, it ſhould be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reſerved for the conſideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot ouſt this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff muſt have judgment.

Having thus ſeen in what courts the party injured in the contract of inſurance is to ſeek for redreſs, let us now conſider, by what form of action that redreſs is to be obtained. The act of parliament, by which the two Inſurance Companies were erected, ordered, that they ſhould have a common ſeal, by affixing which, all corporate bodies ratify and confirm their contracts. Hence a policy of inſurance made by the *Royal Exchange* Aſſurance Company, or the *London* Aſſurance Company,

6 Geo. I. c. 18.

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is a contract under seal; and if the contract is broken, the proceedings against these Companies must be by action of debt or covenant. From this circumstance a great inconvenience arose; for under the plea of the general issue to an action of debt or covenant, the true merits of the case could seldom come in question: but in order to bring them forward, it became necessary to plead specially. This was attended with such a heavy expence, such great delays, and frequent applications to courts of equity for relief, that the legislature at last interposed, and enacted, "that *in all actions of debt* to be sued or commenced against either of the said corporations, upon any policies of insurance under the common seal of such corporations, for the assuring of any ship or ships, goods or merchandizes at sea, or going to sea, it should and might be lawful to and for the said corporations, in such action or suit, to *plead generally, that they owed nothing* to the plaintiff or plaintiffs in such suit or action; and that *in all actions of covenant*, which should be sued or commenced against either of the said corporations upon any such policy of assurance under the common seal of such corporation for the assuring of any ship or ships, goods or merchandizes, at sea or going to sea, it should and might be lawful for the said respective corporations, in such action or suit, to plead generally, *that they had not broke the covenants*, in such policy contained, or any of them; and if thereupon issue should be joined, it should and might be lawful for the jury, if they should see cause, upon the trial of such issue, to find a verdict for the plaintiff or plaintiffs in such suit or action, and to give so much, or such part only of the sum demanded, if it be an action of debt, or so much in damages, if it be an action of covenant, as it should appear to them, upon the evidence given upon such trial, such plaintiff or plaintiffs ought in justice to have."

11 Geo. 1. c. 30. s. 43.

In a subsequent act of parliament the following clause is inserted, "that if any action or suit shall be commenced, brought, or prosecuted against the corporation of the *Royal Exchange* assurance of houses and goods from fire, by any person or persons, bodies politick or corporate, for or concerning any assurance or assurances by the said recited charter, or hereby

36 Geo. 3. c. 26.

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"authorized to be made, or relating to the powers hereby "granted, or concerning any other matter or thing herein or "in the ſaid charter above recited contained, the ſaid corpora- "tion and their ſucceſſors may in ſuch action or ſuit plead the "general iſſue, and give the ſpecial matter in evidence."

The charter recited in the act is that, which enabled the company to make inſurances for lives and againſt fire; and therefore it ſhould ſeem (a ſimilar act having paſſed reſpecting the *London* Aſſurance Company) that in inſurances on lives, and inſurances againſt fire, both theſe companies may plead the general iſſue, as they might by virtue of the ſtatute 11 Geo. 1. in caſes of marine inſurances.

Since the three former editions of this work were pub-
39 Geo. 3. c. 83. liſhed, an act of parliament paſſed, enabling his majeſty to incorporate, by charter, a company to be called, *The Globe In-*
Sect. 2. *ſurance Company*, which charter ſhall empower them to make inſurances upon lives; or on houſes, warehouſes, goods, ſhips, veſſels, barges and other craft, with their cargoes, in port, or uſed on navigable canals, farming ſtock, and all other property, againſt loſs or damage by fire, within *Great Britain* or *Ireland*, and any other parts abroad, within his majeſty's dominions or not; and for other purpoſes hereafter to be mentioned in their proper place. I only allude to this new corporation at preſent, for the purpoſe of ſtating, that by the 9th ſection of the act of incorporation above quoted, the ſame pleas, and the ſame power to the jury to aſſeſs the damages which ſhall actually appear to be due, are given, in the caſe of The Globe Inſurance Company, as were given to the Royal Exchange and *London* Aſſurance Companies by the acts lately recited. Thus it ſtands with reſpect to the corporations.

Wherever the contract of inſurance is entered into with a private underwriter, it is done by the inſurer merely ſubſcribing his name to the inſtrument, which is no more than what is called by the lawyers a ſimple contract; the remedy for a
3 Blackſt. Com. 157. breach of which is by an action of *aſſumpſit*, or an action upon the caſe founded upon the *promiſe* and undertaking of the in-

surer. There are, however, it is to be observed, two kinds of actions of *assumpsit*: the one, what is denominated a general *indebitatus assumpsit*, in which the plaintiff states generally that the defendant, *being indebted* to him in so much money for goods sold, &c. or for money lent to the defendant, or for money had and received to the use of the plaintiff, in consideration thereof, *undertook and promised* to pay the amount; the other is called a *special assumpsit*, which must always be founded on some particular or special agreement. The former can never be used as the means to recover upon a policy of insurance. The only cases, in which it can be at all used with respect to this contract are, where money has been paid by mistake to the insured by the insurer, upon the supposition of a loss, when in fact there was none; a rule which holds, whether the money was paid through the fraud or mistake of the receiver: or where the insured wishes to recover back the premium which he has paid to the insurer. In these cases, the proper mode is to bring an action of *indebitatus assumpsit* for money had and received to the plaintiff's use: and therefore in almost all actions upon policies of insurance, it is usual after the count for the special *assumpsit*, to add one or two general counts; that if the policy should be set aside, and the contract declared void, the insured may at least be enabled to recover the premium.

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1 Salk. 22. Skinner 412.

It being thus evident, that the proper form of action, in order to recover upon a policy of insurance, is a special *assumpsit*, founded upon the express contract of the person who signs it; it will follow as an immediate consequence, that the first thing which is necessary for the plaintiff to insert in his declaration, or state of the case, will be the policy itself, because that is the foundation of the whole. He should also state, that it was signed by the defendant. The next averment will be, that in consideration of the premium being paid, the defendant had undertaken to indemnify against the losses specified in the policy. We saw in the first chapter of this book, that the premium was the consideration upon which the whole contract rested; and that by the custom, the receipt of the premium was acknowledged in the body of the policy. It is then necessary for the plaintiff to

Vide ante, c. 1. p. 26.

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allege that goods and merchandizes were laden on board to the amount of the ſum inſured, and that the plaintiff was intereſted therein; or if the inſurance be upon the ſhip, the inſured's intereſt muſt, in the ſame manner, be averred. The next material averment is, that the property inſured was loſt, and by what means that loſs happened; in ſtating which, the plaintiff muſt bring it within one of the perils inſured againſt by the policy: but he muſt always ſtate it according to the truth. Thus he ought to ſhew, that it was by perils of the ſea, by capture, by fire, by detention, by barratry, or any of the other perils mentioned in the policy.

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Knight v Cambridge, 2 Lord Raym. 1349. 1 Stra. 581.

Where the loſs had been by *barratry*, the breach was thus aſſigned, the proceedings being at that time in *Latin*, *per fraudem et negligentiam magiſtri navis depreſſa et ſubmerſa fuit, et totaliter perdita et amiſſa fuit*; and it was inſiſted, that this was not within the meaning of the word *barratry*, but the breach ſhould have been expreſs, that the ſhip was loſt by the *barratry* of the maſter.

The court were unanimouſly of opinion, that there was no occaſion to aver the fact in the very words of the policy; but if the fact alleged came within the meaning of the words in the policy, it was ſufficient. Barratry imports fraud, and he that commits fraud, may properly be ſaid to be guilty of a neglect, namely, a breach of duty.

It is true that the practice at preſent, as I have reaſon to believe from precedents which I have ſeen ſettled by the ableſt ſpecial pleaders, is to aver ſuch a loſs to have happened "by "the barratry of the maſter or mariners."

If the plaintiff in his declaration allege, that a total loſs has happened, and lay the damages as for a total loſs, it ſhall be no bar to his recovery, though he can only prove a partial loſs; for in an action for damages merely, a man may always recover *leſs*, but never *more* than the ſum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimouſly over-ruled.

See the ſtatutes juſt quoted as to the corporations, upon this point.

The

C. B. R. P.

Gardiner v. Croſedale, 2 Burr. 904. 1 Black. Rep. 198.

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The caſe, in which it was ſo determined, came before the court upon a queſtion reſerved by Lord *Mansfield* at *Niſi Prius* at *Guildhall*, upon an action on the caſe, on a policy of inſurance. The inſurance was made upon one fourth part of the ſhip *Encouragement*, and of its cargo, from *Greenland* to *London*, free from average under a certain value, from the ice. The plaintiff *declared upon a total loſs of the ſhip*; the declaration expreſsly ſtated a *total loſs* of it; and the *damages* were laid for a *total loſs*. But the evidence only proved an *average or partial loſs*: it was not attempted to prove a total one; and it was only ſhewn that the ſhip had received *ſome* damage, which little more than 50 *l.* would have repaired. The defendant's counſel objected at the trial, "that this evidence did not ſupport the plaintiff's declaration." They alſo repreſented the practice to have been on their ſide; namely, that proof of a partial loſs was not ſufficient to maintain a declaration for a total loſs. A verdict was taken for 20 *l.* as for an average loſs: but it was agreed on both ſides that the verdict ſhould be ſubject to the opinion of the court, "Whether it was maintainable in point of law." If the court ſhould be of opinion that it was, the verdict was to ſtand; but if the court ſhould be of a contrary opinion, the plaintiff was to have a judgment of nonſuit againſt him.

Lord *Mansfield*.—"At the trial it appeared to me, and ſo the jury thought, that the preſent caſe could *not* be conſidered as a *total* loſs. The defendant's counſel objected, as they do now, that the jury could not take a partial loſs into their conſideration, upon an expreſs declaration for a total loſs: and I underſtood from them, that the practice ſupported their objection. Mr. *Norton*, who was counſel for the plaintiff at the trial, then argued to the contrary upon principles: and he alſo cited the caſe of *Walker* v. the *Royal Exchange Aſſurance Company*. But that caſe does not prove much; for that was a total loſs. I was ſatisfied upon the principles, provided the practice did not interfere with them, which I was then told it did. I choſe to put it in ſuch a ſhape, that the opinion of the court might be had without delay or expence. No hardſhip was done to the defendant upon the *quantum* of the damages found: for the plaintiff took a great deal *leſs* than it clearly appeared on the evidence that the

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loſs amounted to. I cannot hear of any ſuch determination as can ſupport the objection that has been made by the defendant's counſel. Therefore it ſtands ſingly upon principles. And upon principles it is extremely clear, that the plaintiff may, upon this declaration, recover damages for a *partial* loſs. This is an action upon the caſe, which is a liberal action; and a plaintiff

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may recover *leſs* than the grounds of his declaration ſupport, though *not more*. This is agreeable to juſtice, and conſiſtent with his demand. Here are two grounds of the plaintiff's declaration; namely, the policy, and the damage to the ſhip. As to its being a total or a partial loſs, that is a queſtion more applicable to the *quantum* of the damages, than to the ground of the action. The ground of the action is the ſame, whether the loſs be partial or total; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loſs: this indeed would be an objection if it were true. But the defendant does in truth come prepared to ſhew, that either no damages had happened at all; or, at leaſt, that damages have not happened to ſuch a degree as the plaintiff has alleged in his declaration; or, that he did not ſign the policy. As to the effects of a judgment by default, the defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of enquiry, any greater damages than he could prove to the jury ſworn to aſſeſs them, that he had actually ſuffered. If the preſent objection were to prevail, it would introduce the addition of unneceſſary counts in declarations, and an enormous ſwelling of the records of the court. It is more convenient to lay the caſe ſhort, than prolix. There is no proof of any practice contrary to the principles. It was the apprehenſion of ſuch contrary practice, that was the only occaſion of my having any doubt at the trial. I am now fully ſatisfied, that the plaintiff may recover either the *whole* or *leſs* than he has laid; and therefore this verdict ought, in my opinion, to ſtand. In an ejectment for more, the plaintiff may recover leſs: it is every day's practice."

Mr. Juſtice *Deniſon* concurred, and thought it a very plain caſe. It is an action for *damages* for the loſs of the ſhip. Now, in an action for damages, the plaintiff is to recover his damages according

according to his proof, *pro tanto*; but he is not, in an action for damages, obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a houſe, would not the plaintiff be entitled to recover damages for pulling down *half* the houſe, provided he had proved that the defendant did it? This is no variance of the evidence from the declaration; the evidence tends, in a certain degree, to the proof of what is alleged in the declaration; it is not neceſſary to lay two counts in ſuch a declaration as this. CHAP. XX.

Mr. Juſtice *Foſter* was of the ſame opinion. [402]

Mr. Juſtice *Wilmot*.—"In actions for damages, the plaintiff may recover all, or for any part: the damages are ſeverable, and may be given PRO TANTO. Here damages are laid for a *total* loſs, which is only the meaſure of the damages: and the plaintiff proves a *partial* loſs; which only affects the meaſure of the damages, but is no variance from the allegations contained in the declaration. If this had been a judgment by default, yet the plaintiff could not, even in that caſe, have recovered damages for *any more* loſs than he was able to prove under the writ of enquiry of damages. And as to the defendant's not having ſufficient notice that he ſhould come prepared to defend againſt a partial loſs, I think he had ſufficient notice to come thus prepared: for he ought to come prepared to prove, "that no damage at all happened." If *any* at all happened, he will be liable *pro tanto*, if it be proved."

The *poſtea* was delivered to the plaintiff.

An attempt was alſo once made to nonſuit a plaintiff, becauſe the declaration alleged that he had a ſmaller intereſt than he appeared in proof to have. But this attempt alſo failed.

It was an action on a policy of inſurance, in which the declaration ſtated, that the plaintiff was poſſeſſed of one third of the ſhip on which the inſurance was made. It was proved that the plaintiff had purchaſed the whole ſhip at one period; and as there was no evidence to ſhew that he had ſince parted with any ſhare of it, the counſel for the defendant inſiſted, that

Page v. Rogers, Sitt. at Guildhall, Hil. Vac. 1785.

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that the plaintiff had not proved his declaration, which alleged him to have but one third.

Lord *Mansfield* over-ruled the objection, ſaying, that this was *primâ facie* ſufficient evidence; for *omne majus continet in ſe minus* (*a*).

We have ſeen that policies of inſurance are ſeldom effected by the party himſelf really intereſted, but generally by the intervention of a broker employed by the inſured, who tranſacts the buſineſs with the underwriters as attorney for his principal, from whom he receives his inſtructions, and from which, if he deviate, he is anſwerable to his employer in an action on the caſe; like any other perſon who undertakes any office, employment, truſt, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and ſkill (*b*). It is alſo common for the broker to open the policy in his own name, at the ſame time declaring for whoſe uſe, benefit, or intereſt, the ſame is made; how far ſuch declaration is neceſſary we have formerly explained. As the policy may be made in the name of the broker, ſo alſo may the action be brought in his name, as was done in the caſe of *Godin* and the *Royal Exchange Aſſurance Company*, and a variety of other caſes.

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3 Black. Com. 168.

25 Geo. 3. c. 44. Vide ante, c. 1. p. 16, and ſee alſo 28 Geo. 3. c. 56. ante, p 18. 1 Bur. 490. Vide ante, c. 15.

As this contract depends ſo much upon the pureſt good faith, and the moſt liberal communication of circumſtances, relative to each particular caſe; when gaming inſurances, without inte-

(*a*) But if the plaintiff in this caſe had the whole ſhip, it ſeems that he could never bring another action for the other two thirds; becauſe that would be a ſplitting of actions.

(*b*) As the brokers tranſact the chief part of the buſineſs, and generally pay the premiums, the law has given them a lien upon the policies in their hands, ſo as to enable them to deduct out of any monies they may receive for the aſſured, not only the premium and commiſſion due on the particular policies, but the general balance due to them on the account between them and their principals. And it has alſo been decided, that if a broker ſhould part with the poſſeſſion of the policy, ſo as to loſe his lien upon it; yet if it get back into his hands for any purpoſe whatever, the lien revives. Theſe points were ſettled in the caſe of *Whitehead* v. *Vaughan*, Trin. 25 *Geo.* 3. in B. R. and of *Parker* and others v. *Carter*, in C. P. Trinity 1788: both which caſes are ſtated at length in Mr. *Cooke*'s book on the Bankrupt Laws, 4th edition, p. 579.

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reſt, were aboliſhed by the legiſlature, in order effectually to anſwer the purpoſe intended, it became neceſſary to order that a diſcloſure of all inſurances, effected on the ſame property, ſhould be made even after an action brought.

Thus it was declared, "That in all actions or ſuits brought or commenced by the aſſured, upon any policy of aſſurance, the plaintiff in ſuch action, or ſuit, or his attorney or agent, ſhould, within fifteen days after he or they ſhould be required ſo to do in writing by the defendant, or his attorney or agent, declare what ſum or ſums he had aſſured, or cauſed to be aſſured in the whole, and what ſums he had borrowed at reſpondentia or bottomry, for the voyage in queſtion in ſuch ſuit or action." 19 Geo. 2. c. 37. ſ. 6.

In addition to this very wiſe proviſion, it having appeared to the legiſlature, that ſome vexatious perſons, notwithſtanding the perfect willingneſs of the inſurers to pay loſſes, to which they were liable, ſtill perſevered in bringing actions, by which the defendants were put to great and heavy charges, and had no means of paying the money into court; it was therefore enacted, "That it ſhould and might be lawful for any perſon or perſons, body or bodies corporate, ſued in any action or actions of debt, covenant, or any other action or actions, on any policy or policies of inſurance, *to bring into court any ſum or ſums of money*; and that if any ſuch plaintiff or plaintiffs ſhould refuſe to accept ſuch ſum or ſums of money ſo brought into court as aforeſaid, with coſts to be taxed, in full diſcharge of ſuch action or actions, and ſhould afterwards proceed to trial in ſuch action or actions; and the jury ſhould not aſſeſs damages to ſuch plaintiff or plaintiffs, exceeding the ſum or ſums of money ſo brought into court, ſuch plaintiff or plaintiffs, in every ſuch caſe and caſes, ſhall pay to ſuch defendant or defendants, in every ſuch action or actions, coſts to be taxed; any law, cuſtom, or uſage, to the contrary notwithſtanding." 19 Geo. 2. c. 37. ſ. 7.

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Theſe preliminary ſteps being taken, the defendant is to put in his plea to the charge or declaration of the plaintiff; which Vide ſupra.

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which by the act of parliament, is prescribed to the Assurance Companies, when they are defendants; namely, that they owe nothing, if the action be debt: or if it be covenant, that they have not broken the covenants, which they had undertaken to keep. But in the case of a private insurer, as the action is merely an *assumpsit*; so he answers to it in *non assumpsit*; that is, the defendant has not promised as the plaintiff has alleged. Under this plea, the defendant will have a right to take advantage of all those circumstances, which, as we have seen, will either render the policy void, or make it of no effect: such as fraud, want of interest, not being sea-worthy, deviation, non-performance of warranties, and all other grounds stated in former chapters.

Issue being thus joined between the parties, the next object for our consideration is the proof, which it will be necessary for the plaintiff to produce, in order to support his case. This enquiry will be rendered very easy, by reflecting upon those allegations, which, as we have before shewn, it is incumbent upon the plaintiff to insert in his declaration. We have seen, that the policy must be set out in the declaration; and consequently the first evidence to be given is, that the defendant's hand-writing is subscribed to the policy. This, in the liberality of modern practice, is seldom required to be done; as the subscription is usually admitted; but in strictness, it may be

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insisted on: and in a work of this nature, it is my business to point out every thing, which either party is expected, or compellable to perform. When the signature is once proved, the court and jury are in possession of the extent of the contract, (except as it may be further extended by *usage*), the conditions to be performed on either side; and all the other circumstances relative to the risk insured. And although in the course of our enquiries, we have seen frequent instances where the usage and practice of a particular trade controul and extend the written words of a policy; yet in no case shall evidence of any agreement be allowed, which directly tends to contradict the policy; for to suffer them to be defeated by agreements by parol, not appearing, would be greatly to diminish their credit, and to render them of no value.

Wide ante, c. 2.

Thus

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Thus in an action upon a policy of insurance "*from Archangel to Leghorn,*" the defendant said, that the agreement before the subscription was, that the adventure should begin, *but from the Downs*; but this agreement was not put into writing. Lord Chief Justice *Pemberton* said, that policies were sacred things; and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on a condition, when it may be that the bill had been negotiated: for though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advantage of trade. The jury, notwithstanding this direction, found for the defendant: but afterwards there was a trial at bar, and a verdict was given for the plaintiff, according to the opinion of the court.

Kaines v Knightly, Skinner, 54.

The policy not only proves the extent and nature of the contract; but it also establishes another allegation in the plaintiff's declaration, namely, *that the premium was paid:* for it was formerly shewn, that every policy contains the following clause: "*confessing ourselves paid the consideration due unto us* "*for this assurance by the assured, at and after the rate of* "*per cent.*"

Vide c. 1.

The plaintiff having averred in his declaration, that he is *interested* to the amount of the property insured, it is absolutely necessary that this allegation should be proved. This he must do by a production of all the usual documents, such as, *the bills of sale*, bills of parcels, and the costs of the outfit; *the bills of lading* (*a*), signed by the master, specifying the goods received

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on

(*a*) The first great cause, in which the law relative to bills of lading came much under discussion, was in a modern case of *Caldwell* and others *v. Ball*, reported very much at length, and with great accuracy in the 1st Term Reports, page 205. That case was fully argued at the bar, and very much debated on the bench. Amongst other things the court held, that a bill of lading is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in the bill of lading: that it is assignable in its nature; and by indorsement the property is vested in the assignee. That where several bills of lading of the same date, but of different imports, have been signed,

no

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" all average, and without the benefit of ſalvage." It appeared that the plaintiffs were proprietors of the *cargo* but not of the *ſhip*. That the ſhip originally ſailed with the cargo on board from *Riga* to *Marſeilles*, and that an inſurance had been effected at *Bremen* upon the cargo for that voyage; in the courſe of which ſhe was taken, and brought into *Falmouth*, by an *Engliſh* privateer. That a ſentence of condemnation had been there obtained, which was afterwards reverſed upon the prize having been proved to be a neutral ſhip, but the expences of procuring that reverſal were ordered by the Admiralty Court to be *a charge upon the cargo*. The plaintiff's agents accordingly paid the ſum of 1,031 *l.* 14 *s.* for the expences of reclaiming the ſhip and cargo; and immediately procured the policy in queſtion to be effected in *January* 1781, according to the purport of the memorandum. In the *February* following, the ſhip ſet ſail from *Falmouth* with the original cargo on board, in the proſe-

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cution of her voyage to *Marſeilles*; but on the 26th of the ſame month, *before her arrival there*, was captured by a *Spaniſh* ſhip, and carried into *Ceuta* in *Spain*, where ſhe was again condemned. An appeal was brought in the ſuperior court of *Madrid*, which promiſing to be of long continuance, the cargo, which was of a periſhable nature, was ordered to be ſold, and the proceeds to be brought into court, to wait the event of the ſuit. In *May* 1783, the veſſel was reſtored by ſentence of the court, and the ſurplus of the proceeds, which aroſe from the ſale of the cargo, was paid to the owners, deducting the expences incurred in *Spain* in proſecuting the appeal. After all the charges paid, there only remained twenty-ſix rix dollars. As ſoon as the ſhip was liberated, ſhe ſailed from *Ceuta* to *Malaga*, in order to refit, and having there made the neceſſary repairs, ſet ſail for *Bremen*, and in that voyage was loſt. The inſurance made upon the cargo at *Bremen* has been paid. The declaration averred, that "*whilſt the ſhip was proceeding in her "ſaid voyage from Falmouth to Marſeilles, and before ſhe could "arrive at Marſeilles, ſhe was captured by the Spaniards, and "thereby the ſaid ſhip, and alſo the goods and merchandizes on "board her, were totally loſt to the plaintiffs.*" At the trial it was objected on the part of the defendant, 1ſt, That this was not an inſurable intereſt; and 2dly, That the plaintiffs could

not

not recover upon the policy in this form of declaring, for they ſtated the loſs to have happened *by capture*; whereas, though the veſſel was captured, yet, having been afterwards reſtored, ſhe might have reached her deſtined port, notwithſtanding the capture, in which caſe the underwriters would have been diſcharged by the terms of the memorandum. I was of that opinion, and upon the laſt ground I nonſuited the plaintiffs."

This caſe was very fully argued both upon the merits, and the formal objection, after which all the Judges ſpoke upon the queſtion.

Lord *Mansfield*.—"A loſs accrued upon the cargo in the voyage: the underwriter is ſued and the loſs is averred in the declaration to be *by capture*. The fact of the caſe is, that the ſhip was taken by a *Spaniſh* privateer, but was afterwards reſtored, and in a condition to purſue the voyage, and was afterwards loſt in another voyage."

Mr. Juſtice *Willes*.—"Upon this caſe, it is clear, that the plaintiffs cannot recover. In the firſt place, there was certainly a deviation, for the ſhip ſet ſail for *Malaga* inſtead of proceeding to *Marſeilles*. Secondly, the plaintiff has declared for a loſs *by capture*: but, after the capture, the policy might ſtill have been complied with by the ſhip's going to *Marſeilles*; and therefore the loſs cannot be ſaid to have happened by that circumſtance." [409]

Mr. Juſtice *Aſhhurſt* and Mr. Juſtice *Buller* alſo delivered their opinions, agreeing with Lord *Mansfield* and Mr. Juſtice *Willes* upon the formal objection; and both went much at large into the merits, upon which I forbear to follow them or the Chief Juſtice, as what paſſed upon that ſubject is not material to our preſent enquiry.

But where a loſs is averred to be by perils of the ſea, and ſome of the goods inſured are ſpoiled, and others ſaved, it is allowable to give the expence of the ſalvage in evidence upon ſuch an averment, becauſe it is a conſequence of the accident laid in the declaration.

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Cary v. King, Caſ. Temp. Hardwicke, B. R. 304.

In an action on a policy of inſurance, for inſuring goods on board the ſhip *A.* the plaintiff declares that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. The evidence was, that many of the goods were ſpoiled, but ſome were ſaved; and the queſtion was, Whether the plaintiff might give in evidence the expence of ſalvage, that not being particularly laid as a breach of the policy in the declaration.

Lord *Hardwicke* Chief Juſt.—"I think they may give it in evidence; for the inſurance is againſt all accidents. The accident laid in this declaration is, that the ſhip ſunk in the river; it goes on and ſays, that by reaſon thereof the goods were ſpoiled, that is the only ſpecial damage laid: yet it is but the common caſe of a declaration that lays ſpecial damage, where the plaintiff may give evidence of any damage that is within his cauſe of action as laid. And though it was objected, that ſuch a breach of the policy ſhould be laid, as the inſurer may have notice to defend it; it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe it muſt neceſſarily follow, that ſome damage did happen."

CHAPTER THE TWENTY-FIRST.

Of Bottomry and Reſpondentia.

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THE contract of bottomry is in the nature of a mortgage of a ſhip, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip, as a ſecurity for the repayment: and it is underſtood, that if the ſhip be loſt, the lender alſo loſes his whole money; but if it return in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt ſtipulated to be paid, however it may exceed the uſual, or legal rate of intereſt. When the ſhip and tackle are brought home, they are liable, as well as the perſon of the borrower, for the money lent.—But when the loan is not made upon the veſſel, but upon the goods and merchandizes laden thereon, which, from their nature, muſt be ſold or exchanged in the courſe of the voyage, then the borrower only is *perſonally* bound to anſwer the contract; who therefore in this caſe is ſaid to take up money at *reſpondentia*. In this conſiſts the difference between *bottomry* and *reſpondentia*; that the one is a loan upon the ſhip, the other upon the goods: in the former the ſhip and tackle are liable, as well as the perſon of the borrower; in the latter, for the moſt part, recourſe muſt be had to the *perſon* only of the borrower. Another obſervation is, that in a loan upon bottomry, the lender runs no riſk though the goods ſhould be loſt, and upon reſpondentia, the lender muſt be paid his principal and intereſt, though the ſhip periſh, provided the goods are ſafe. But in all other reſpects, the contract of bottomry and that of reſpondentia are upon the ſame footing; the rules and deciſions applicable to one, are applicable to both; and therefore in the courſe of our enquiries, they ſhall be treated as one and the ſame thing, it being ſufficient to have once marked the diſtinction between them.

2 Black. Com. 457.

2 Black. Com. 458.

2 Valin Com. P. 4.

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2 Black. Com. 458. 1 Siderfin. 27.

Theſe terms are alſo applied to another ſpecies of contract, which does not exactly fall within the deſcription of either; namely, to a contract for the repayment of money, not upon the ſhip and goods only, but upon the mere hazard of the voyage itſelf; as if a man lend 1000 *l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary intereſt, in caſe a ſpecific voyage named in the condition ſhall be ſafely performed: which agreement is ſometimes called *fœnus nauticum* or *uſura maritima*. But as this ſpecies of bottomry opened a door to gaming and uſurious contracts, eſpecially in long voyages, the legiſlature, at the time it ſuppreſſed inſurances upon wagering policies, introduced a clauſe, by which it was enacted, "That all ſums of money "lent on bottomry, or at reſpondentia, upon any ſhip or ſhips "belonging to his Majeſty's ſubjects, *bound to or from the Eaſt "Indies*, ſhould be lent only on the ſhip, or on the merchan- "dize or effects, laden or to be laden, on board of ſuch ſhip, "and ſhould be ſo expreſſed in the condition of the ſaid bond; "and the benefit of ſalvage ſhould be allowed to the lender, "his agents or aſſigns, who alone ſhould have a right to make "aſſurance on the money ſo lent, and in caſe it ſhould appear "that the value of his ſhare in the ſhip or in the merchandizes "or effects laden on board of ſuch ſhip, did not amount to the "full ſum or ſums he had borrowed as aforeſaid, ſuch borrower "ſhould be reſponſible to the lender for ſo much of the money "borrowed, as he had not laid out on the ſhip or merchandizes "laden thereon, with lawful intereſt for the ſame, in the pro- "portion the money not laid out ſhould bear to the whole "money lent, notwithſtanding the ſhip and merchandizes "ſhould be totally loſt."[22]

Molloy, lib. 2. c. 11. ſ. 8.

19 Geo. II. c. 37. ſ. 5.

This ſtatute has entirely put an end to that ſpecies of contract which was laſt mentioned, namely, a loan upon the mere voyage itſelf, as far, at leaſt, as relates to *India* voyages; but as none other are mentioned, and as *expreſſio unius eſt excluſio alterius*, theſe loans may be made in all other caſes, as at the Common Law, except in the following inſtance, which is another ſtatute prohibition. The ſtature alluded to declares, that all contracts made or entered into by any of his Majeſty's ſubjects,

7 Geo. I. c. 21. ſ. 2.

ſubjects, or any perſons in truſt for them, for or upon the loan of any monies by way of bottomry, on any ſhip or ſhips in the ſervice of foreigners, and bound or deſigned to trade in the *Eaſt Indies or parts aforeſaid*, ſhall be null and void.

This act, it ſhould ſeem, does not mean to prevent the king's ſubjects from lending money on bottomry on foreign ſhips trading from their own country to their ſettlements in the *Eaſt Indies*. The purpoſe of the ſtatute was only to prevent the people of this country from trading to the *Britiſh* ſettlements in *India* under foreign commiſſions, and to encourage the lawful trade thereto.

It lately became a queſtion in the Court of Common Pleas, whether an *American* ſhip, ſince the declaration of *American* independence, was *a foreign* ſhip, within the ſtatute of the 7 *Geo.* 1. *ch.* 21. *ſ* 2. It came before the court, upon a motion to diſcharge the defendant out of cuſtody upon entering a common appearance. The defendant was held to bail upon a reſpondentia bond, which was executed by the defendant, who was an *American*, to ſecure the payment of a cargo ſhipped by the plaintiff on board an *American* ſhip in the *Eaſt Indies*, homeward bound from *Calcutta* to *Rhode-Iſland* in *America*. The ſhip had ſailed from *England*, and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.

Sumner v. Green, 1 H. Blackſ. 301.

The court were much inclined to think the bond was void, the caſe being within the miſchief deſigned to be remedied by the act. But as the queſtion was of conſiderable conſequence, they thought it not proper to be diſcuſſed on this ſummary application: but they ordered the defendant to be diſcharged on the ground, that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in priſon: more particularly as the plaintiff would by ſuch means have an opportunity of tampering with the defendant in priſon, and of eſcaping from the penalties of the act, by preventing the caſe from being brought before the court.

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A loan upon the voyage, without a ſecurity on the ſhip or goods, is entirely prohibited by the laws of *France*; for in the marine ordinances of that country, there is a *general* regulation ſimilar to that made here with reſpect to *India* ſhips; "Faiſons "deſenſes de prendre deniers a la groſſe ſur le corps et quille du "navire, ou ſur les marchandiſes de ſon chargement, *au delà* "*de leur valeur*, au peine d'etre contraint, *en cas de fraude*, "au paiement des ſommes entieres, non obſtant la perte ou "priſe du vaſſeau." And in another place it is ſaid, that where a greater ſum is borrowed than the ſhip or goods are worth, where there is no fraud, the contract is void, except as to the amount of the real value of the ſhip or goods. If then the contract be only binding as far as there is property to anſwer the loan, it follows that, by the laws of *France*, this contract cannot exiſt upon the hazard of the voyage merely, unleſs there be a ſecurity alſo upon the ſhip or goods.

Ord. of Lou. 14. tit. des Contrats à groſſe Avant. art. 3.

Loc. cit. art. 15.

The contract of bottomry and reſpondentia ſeems to deduce its origin from the cuſtom of permitting the maſter of a ſhip, when in a foreign country, to hypothecate the ſhip in order to raiſe money to refit. Such a permiſſion is abſolutely neceſſary, and is impliedly given him in the very act of conſtituting him maſter, not indeed by the Common Law, but by the Marine Law, which in this reſpect is reaſonable; for if a ſhip happen to be at ſea, and ſpring a leak, or the voyage is likely to be defeated for want of neceſſaries, it is better that the maſter ſhould have it in his power to pledge the ſhip and goods (*a*) or either of them, than that the ſhip ſhould be loſt, or the voyage defeated. But he cannot do either for any debt of his own: but merely in caſes of neceſſity, and for completing the voyage. Although the maſter of the veſſel has this power while abroad, becauſe it is abſolutely neceſſary for purpoſes of commerce and navigation; yet the very ſame authority which gave that power in thoſe caſes, has denied it when he happens to be in the ſame place where the owners reſide. Thus the laws of *Oleron*, in the place above cited, ſpeak

2 Blackſt. Com. 457.

Barnard v. Bridgeman, Moor 918. fully reported in Hobart, p. 11.

Molloy, b. 2. c. 2. ſ. 14. Leg. Oler. art. 1 and 24.

(*a*) That the maſter may hypothecate the goods as well as the ſhip, ſee Salk. 34. pl. 7.

of

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of the captain being in a foreign country, and first writing home to his owners for money, before he takes money on bottomry: and the laws of the *Hanſe Towns*, which were founded on thoſe of *Oleron*, ſpeak the ſame language; for they ſay, "a maſter being in *a ſtrange country*, if neceſſity drive him "to it, may take up money on bottomry, if he cannot get "it without, and the owners ſhall bear the charge." In addition to this, from all the caſes, which have been determined at the Common Law upon the ſubject, it may be inferred that the ſhip ſhould be abroad, as well as in a ſtate of neceſſity, to juſtify the captain or maſter in taking money on bottomry. *Molloy* in expreſs terms declares, that a maſter has no power to take up money on bottomry, in places where his owners dwell; otherwiſe he and his eſtate muſt be liable thereto.— If, indeed, the owners do not agree in ſending the ſhip to ſea, the majority ſhall carry it, and then money may be taken up by the maſter on bottomry for their proportion who refuſe, although they reſide upon the ſpot, and it ſhall bind them all. The two laſt rules are the ſame with the marine ordinances of *France* upon that point: for they alſo declare, that thoſe who lend money to the maſter, in the place where the owners reſide, without their conſent, ſhall have no ſecurity or hypothecation, but on ſuch part of the ſhip only, as belongs to the maſter himſelf, even though the money was advanced for repairs, or for purchaſing proviſions. But that the ſhares of thoſe owners, who refuſe to ſend out the ſhip, ſhall be affected by the loan of money to the maſter for neceſſaries. The juſtice and propriety of ſuch a regulation, are evident from conſidering that ſuch a contract was only intended for the benefit of all parties in thoſe places where the owners had neither a reſidence, nor any correſpondents.

Laws of the Hanſe Towns, art. 60.

Hobart, 11. Noy 95.

Molloy, l. 2. c. 11. ſ. 11.

Molloy loc. cit.

Ord. of Lou. 14. tit. Avant. à la groſſe, art. 8 and 9.

2 Valin Com. 10.

The contract of which we treat is of a different nature from almoſt all others: but that, which it moſt nearly reſembles, is the contract of inſurance: for the lender on bottomry or at reſpondentia, runs almoſt all the ſame riſks, with reſpect to the property on which the loan is made, that the inſurer does with reſpect to the effects inſured. There are, however, ſome conſiderable diſtinctions; for inſtance, the lender

Pothiér, Tr. du pret. à la groſſe Avant. not. 6.

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lender ſupplies the borrower with money to purchaſe thoſe effects upon which he is to run the riſk: not ſo with the inſurer. There are alſo various other diſtinctions.

Vide the Introduction.

But however ſimilar they may be in other reſpects, they differ very much in point of antiquity. We have formerly endeavoured to ſhew, that the contract of inſurance was certainly unknown to the traders of the ancient world: but it is equally clear that with the contract of bottomry and reſpondentia, or what was equivalent to it, they were perfectly acquainted. In thoſe fragments of the famous ſea laws of the *Rhodians*, which have been preſerved and tranſmitted to our times, I think there are very evident traces of this ſpecies of contract.

Leg. Rhod. ſ. 1. art. 21.

In one ſection it is ſaid, "that when maſters of ſhips, who "are proprietors of one third of the lading, take up mo- "ney for the voyage, whether for the outward or homeward "bound, or both; all tranſactions ſhall paſs according to the "writings drawn up between the maſter and lender, and the "latter ſhall put a man on board the ſhip to take care of his "loan." But in another place, theſe laws ſpeak more explicitly, and with a direct reference to the diſtinction between naval intereſt, and that which is given for a land riſk. "If "maſters or merchants borrow money for their voyages, the "goods, freights, ſhips, and money, being free, they ſhall not "make uſe of ſuretyſhip, unleſs there be ſome apparent "danger either of the ſea or of pirates. And for the money "ſo lent, the borrowers ſhall pay *naval intereſt*."

Leg. Rhod. ſ. 2. art. 16.

From theſe two quotations, little doubt can be entertained, but that the *Rhodians* uſed to borrow and lend, upon the hazard of the voyage, for an increaſed premium. It was formerly ſeen, that the *Rhodian* laws in general were adopted by the *Romans*; and conſequently that branch of them, which relates to bottomry amongſt the reſt; for you can hardly open a book upon the *Roman* law, but you meet with chapters, *de nautico fœnore*, *de nauticis uſuris*, which plainly ſhew that this contract was well known to the juriſts of that diſtinguiſhed nation. It was alſo called by them *pecunia trajectitia*: becauſe it was given to the borrower to be employed by him in commerce upon and beyond the ſea. It appears from *Valin*, that ſome writers of the

Digeſt. lib. 22. tit. 2. Cod. lib. 4. tit. 33.

2 Valin, Com. 1.

the *French* nation had ſuppoſed, that this contract was wholly unknown to the ancients, and that it was peculiar to *France* alone. *Valin* very clearly expoſes the abſurdity of ſuch an idea; and it ſeems to be ſufficiently anſwered, if deſerving of an anſwer, by what has been already ſaid. In addition to this we may add, that ſo far from being peculiar to *France*, it has obtained a place in the codes of all the maritime ſtates, whoſe laws have been promulgated, or have been at all famous in the modern world. In this chapter we have already had occaſion to cite two paſſages from the judgments, or laws of *Oleron* upon the ſubject, as well as the 60th article of the laws of the *Hanſe* towns: and by a reference to the 45th article of the laws of *Wiſbuy*, it will be found, the nature of bottomry, as well as its name, was perfectly known to the makers of thoſe ordinances.

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Art. 1 and 22.

Laws of Wiſb. art. 45.

In the *Guidon*, indeed, it is ſuppoſed that the contract of bottomry now in uſe, is not at all the ſame as that which was known to the ancients. This authority is reſpectable: but facts muſt ſpeak for themſelves; in addition to which, the celebrated *Emerigon* has obſerved, that the aſſertion of the author of the *Guidon* is only true with reſpect to the form which the modern regulations have given to this contract, the true origin of which is loſt in its antiquity.

Le Guid. c. 18. art. 2.

2 Emerigon, p. 384.

In our definition of bottomry it was ſaid, that if the ſhip arrive ſafe, the lender ſhall be paid his principal, and the ſtipulated intereſt due upon it, however much it exceed the legal rate. The true principle, upon which this is allowed, is not merely the great profit and convenience of trade, as has frequently been urged; but the riſk which the lender runs of loſing both principal and intereſt; for he runs the contingency of winds, ſeas, and enemies. It is therefore of the eſſence of a contract of bottomry, that the lender runs the riſk of the voyage; and that both principal and intereſt be at hazard; for if the riſk go only to the intereſt or premium, and not to the principal alſo, though a real and ſubſtantial riſk be inſerted, it is a contract againſt the ſtatute of uſury, and therefore void. This has been frequently ſo determined in our courts of law; and it is conſonant to the ideas of foreign writers.

Molloy, lib. 2. c. 11. ſ. 8. 13.

2 Vezey, 148.

2 Vezey, 154.

12 Anne, ſtat. 2. c. 16.

Pothiér, Not. 16.

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An action of debt was brought upon an obligation. The defendant pleaded the ſtatute of uſury, and ſhewed, that a ſhip went to fiſh in *Newfoundland*, (which voyage might be performed in eight months), and that the plaintiff delivered 50 *l.* to the defendant, to pay 60 *l.* upon the return of the ſhip off *Dartmouth*: and if the ſaid ſhip, by occaſion of leakage or tempeſt, ſhould not return from *Newfoundland* to *Dartmouth*, then the defendant ſhould pay the 50 *l.* only; and if the ſhip never returned, he ſhould pay nothing. And it was held by all the court, not to be uſury within the ſtatute. For if the ſhip had ſtayed at *Newfoundland* two or three years, he ſhould have paid at the return of the ſhip but 60 *l.*: and if the ſhip never returned, then nothing; ſo that the plaintiff ran hazard of having leſs than the intereſt which the law allows; and poſſibly, neither principal nor intereſt.

Sharpley v. Hurrell, Cro. Jac. 208.

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This caſe was, upon another occaſion, mentioned in argument by one of the judges on the bench; the principle, on which it was decided, was recognized, and the caſe itſelf allowed to be law.

Roberts v. Tremayne, Cro. Jac. 508.

So alſo in another caſe of debt upon an obligation, conditioned to pay ſo much money, if ſuch a ſhip returned within ſix months from *Oſtend* in *Flanders* to *London*, which was more by the third part than the legal intereſt of money; and if ſhe do not return, then the obligation to be void: the defendant pleaded, that there was a corrupt agreement betwixt himſelf and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he ſhould have no more for intereſt than the law permits, in caſe the ſhip ſhould ever return; and avers that the obligation was entered into by covin, to evade the ſtatute of uſury, and the penalty thereof: upon this averment the plaintiff took iſſue, and the defendant demurred.

Joy v. Kent, Hard. Rep. 418.

Lord Chief Baron *Hale*.—"Clearly this bond is not within the ſtatute, for this is the common way of inſurance; and if this were void by the ſtatute of uſury, trade would be deſtroyed. It is not like to the caſe, where the condition of the bond is to give ſo much money, if ſuch or ſuch a perſon be then

then alive; for there is a certainty of that at the time. But it is uncertain and a caſualty whether ſuch a ſhip ſhall ever return or not."

In another caſe of debt upon an obligation for 300*l.* the condition was, that if ſuch a ſhip went to *Surat* in the *Eaſt Indies*, and returned ſafe; or if the owner, or the goods laden on board the ſhip returned ſafe, then the defendant was to pay the principal to the plaintiff, and 40*l.* for each 100*l.*; but that if the ſhip ſhould periſh by unavoidable caſualties of ſea, fire, or enemies, to be proved by ſufficient teſtimony, then the plaintiff ſhould have nothing. The doubt was, whether this was an uſurious contract: and it was ſaid to be ſo, becauſe the payment depended upon ſo many things, one of which in all probability would happen. But the whole court held it not to be within the ſtatute. Soome v. Gleen, 1 Sid. 27. 1 Lev. 54. 1 C.

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Lord Chief Juſtice *Bridgman* took a diſtinction between a bargain of this kind, and a loan; for where there is a bargain, as here, and the principal is hazarded, that cannot be within the ſtatute of uſury; but it is otherwiſe of a loan, where the principal is not in danger. Here there are apparent riſks of the ſea, fire, and enemies, and the length of the voyage; all of which endanger the loſs of the principal. Theſe bottomry contracts are for the advancement of trade, and therefore judgment muſt be for the plaintiff.

Theſe caſes are all uniform in the principle which they go to eſtabliſh, that, on account of the riſk, the intereſt ſhall be larger than the common rate: but notwithſtanding this, a caſe is to be found in the Equity Reports, which directly tends to deſtroy the rule of deciſion in all theſe caſes.

A part owner of a ſhip borrowed money of the plaintiff upon a bottomry bond, payable on the return of the ſhip from the voyage ſhe was then going in the ſervice of the *Eaſt India Company*, who broke up the ſhip in the *Eaſt Indies*; and the owners brought their action againſt the Company, and recovered damages, which did not, however, amount to a full ſatisfaction. Dandy v. Turner, 1 Equity Caſes, Abr. 372.

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tion. The plaintiff brought his bill to have his proportionable ſatisfaction out of the money recovered; but his bill was diſmiſſed, and he was left to recover as well as he could at law; for a court of equity will never aſſiſt a bottomry bond, which carries *unreaſonable intereſt*.

This caſe conveys a very unmerited cenſure upon bottomry bonds, not at all warranted by the long chain of uniform deciſions in their favour. Indeed, from the very nature of the contract, they are to carry the naval intereſt, which is always greater than land intereſt, in proportion as the riſks run by the lender on bottomry are much greater than thoſe which a lender upon common bonds incurs (*a*).

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4 Com. Dig. 193. 2 Vezey, 146.

To be ſure if a contract were made, by colour of bottomry, in order to evade the ſtatute, it would be uſurious and void, and highly deſerving of all the cenſure and diſcouragement which the courts, either of law or equity, could poſſibly throw upon it.

Introd. de Aſſecur. Not. 26.

In *England* then it is clear, from theſe caſes, that there is nothing unlawful in the contract of bottomry: but ſome writers in foreign countries have endeavoured to hold it up to the world, as an illicit and an uſurious bargain. *Straccha*, who has written upon inſurances, has introduced a long diſſertation to prove the truth of this poſition; and ſeveral other writers have either preceded or followed him in ſupport of the ſame doctrines. If, indeed, the money ſo lent were given merely by way of a loan, and ſuch exceſſive intereſt were demanded for the uſe of the money only; there might be force in the objection. But when it is conſidered as the price of the great riſks incurred, it has not the leaſt ſemblance of uſury; it is a fair and conſcientious contract highly beneficial to the commerce and general intereſts of ſociety.

(*a*) Mr. *Fonblanque* in his valuable edition of "A Treatiſe of Equity" has ſuppoſed that in the above paſſage I meant to complain of the interference of a Court of Equity in caſes where *exorbitant naval intereſt* was demanded. But a little attention to the paſſage complained of, and alſo to what follows, will demonſtrate, that I only alluded to general cenſures upon a ſpecies of contract ſo highly beneficial for commercial purpoſes. See Fonbl. vol. i. p. 243.

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These authors have met with very able oppoſers in *Pothier* and *Emerigon*, who have clearly ſhewn the fallacy of their doctrine; and they have proved to demonſtration, that even the fathers of the church have acknowledged, that this contract has nothing in it offenſive to religion or good morals. Almoſt all the writers of eminence agree with the two laſt named, as to the legality of loans on bottomry and at reſpondentia: and it is now univerſally admitted and practiſed in all the maritime and trading countries in *Europe*.

Pothier Avanture à la groſſe, Not. 2. 2 Emer. 390. Loccenius, lib. 2. c. 6. Not. 3. Roccus de Navibus et Naulo, not. 50. 2 Black. Com. 457.

But as the hazard to be run is the very baſis and foundation of this contract; it follows, that if the riſk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the ſtatutes of uſury might be evaded. This was ſo decided in the Court of Chancery.

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The caſe was upon a bottomry bond, whereby the plaintiff was bound in conſideration of 400*l.* as well to perform the voyage within ſix months, as at the ſix months end to pay the 400*l.* and 40*l.* premium, in caſe the veſſel arrived ſafe, and was not loſt in the voyage. It happened that the plaintiff never went the voyage, whereby the bond became forfeited, and he now preferred his bill to be relieved. Upon the former hearing, as the ſhip lay all the time in the port of *London*, and there was no hazard of loſing the principal, the Lord Keeper thought fit to decree, that the defendant ſhould loſe the premium of 40*l.* and be contented with his principal and *ordinary intereſt*. And now, upon a rehearing, he confirmed his former decree.

Deguilder v. Depeiſter, 1 Vern. 263.

With this decree, which is equitable and juſt, the *French* writers agree. They ſay, that in ſuch a caſe, "L'emprunteur "ſera bien obligé de rendre la ſomme qui lui a été prêtée, mais "il ne ſera pas obligé de payer en outre la ſomme qu'il a promis "de payer pour le profit maritime; car le profit maritime étant "le prix des riſques que le prêteur devoit courir des effets ſur "leſquels le prêt a été fait, il ne peut lui être dû de profit mari-"time quand il n'a couru aucuns riſques, ne pouvant pas y avoir "un prix des riſques, s'il n'y a pas eu de riſques."

Pothier Traité à la Groſſe Avanture, Not. 38. 2 Valin 10.

Bottomry

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Bottomry bonds generally expreſs from what time the riſk ſhall commence, as that the ſhip ſhall ſail from *London* to ſuch a port abroad, &c. In ſuch caſes, the contingency does not commence till the departure: and therefore if the ſhip receive injury by ſtorm, fire, &c. before the beginning of the voyage, the perſon borrowing alone runs the hazard. But if the condition be, "that if the ſhip ſhall not arrive at ſuch a place by ſuch a time, then, &c." in theſe inſtances, the contract commences from the time of ſailing, and a different rule, as to the loſs, will neceſſarily prevail.

Vide the Appendix. No. 2.

Beawes Lex Merc. Red. 4th edit. p. 127.

We have ſhewn at the beginning of this chapter, that the amount of the loan on bottomry or reſpondentia, in this country, is not reſtrained by any regulation whatever; although it is in many maritime ſtates by expreſs ordinances: that the only reſtriction in the law of *England* is, with reſpect to money lent on ſhips and goods going to the *Eaſt Indies*, which, by ſtatute, muſt not exceed the value of the property on which the loan is made. It remains then to ſee what thoſe riſks are, to which the lender undertakes to expoſe himſelf. Theſe are for the moſt part mentioned in the condition of the bond, and are nearly the ſame, againſt which the underwriter, in a policy of inſurance, undertakes to indemnify, "*Limita hoc ſingulariter, ut creditor ſubeat periculum navigationis, in caſibus fortuitis tantum.*" Theſe accidents are, tempeſts, pirates, fire, capture, and every other misfortune, except ſuch as ariſe either from the defects of the thing itſelf, on which the loan is made, or from the miſconduct of the borrower: for, ſays the *Italian* lawyer, laſt quoted, in continuation of the above ſentence, "*Secus eſt ſi infortunium, vel naufragium ex culpâ debitoris præceſſerit, quia tunc creditor non tenetur de periculo, et damno, in quod incurritur ex culpâ vehentis, prout in ſimili deciditur in materiâ aſſecurationis, ut quantumcumque aſſecuratio ſit generalis, non contineat periculum, aut damnum, quod facto aſſecurati contingit.*"

2 Magens 28. 166.

19 Geo. 2. c. 37. ſ. 5.

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Vide the Appendix. No. 2.

Roccus de Navibus, Not. 51.

2 Valin, 14. Roccus, loc. cit.

It ſeems to have been a doubt late in the laſt century, whether a loſs by the attacks of pirates was a riſk which the lender on bottomry had by his contract undertaken to bear; for it was

Barton v. Wolliford, Comb. 56.

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ingued in the King's Bench, in the reign of *James* the Second. But the court were of opinion, that piracy was one of the dangers of the ſeas; and the defendant had judgment.

The lender is anſwerable likewiſe for loſſes by capture; or to ſpeak more accurately, if a loſs by capture happen, he cannot recover againſt the borrower; but in bottomry and reſpondentia bonds, capture does not mean a mere temporary taking, but it muſt be ſuch a capture as to occaſion a total loſs. And therefore if a ſhip be taken and detained for a ſhort time, and yet arrive at the port of deſtination within the time limited, (if time be mentioned in the condition), the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole Court of King's Bench, in a caſe upon a bond of this nature; the proceedings on which were fully ſtated, when the unanimous opinion of the court was delivered by Lord *Mansfield*.—"This comes before the court upon a motion, on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ſhip's ſafe arrival at *New York*, a certain ſum of money ſhould be paid to the plaintiff; but that in caſe the ſhip ſhould miſcarry, be loſt, caſt away, or taken by the enemy, the plaintiff ſhould have nothing. The defendant pleaded three pleas: 1ſt, *Non eſt factum*; 2dly, That the ſhip did not arrive at *New York*, the port of deſtination; 3dly, That the ſhip was captured. Upon the two firſt pleas iſſue was joined: and to the laſt, there was a replication of recapture. The facts, which appeared in evidence on the trial, are theſe: *the ſhip was taken, before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her ſtores; at which time *ſhe was retaken* by an *Engliſh* privateer and carried into *Halifax*. The Admiralty Court adjudged her to be a good prize to the *Engliſh* privateer, and decreed that ſhe ſhould be reſtored to the original owners, on paying one eighth for ſalvage: that ſhe proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ſhip was not ſufficient to ſatisfy the bond. Theſe are the facts.

Joyce v. Williamſon, B. R. Mich. Term, 23 Geo. III.

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Now it is clear, that, by the law of *England there is neither average nor ſalvage upon a bottomry bond.* It was indeed contended at the bar on the part of the defendant, that this caſe was within the ſaving of the bond; for it is provided, that in caſe of loſs by *capture*, &c. the bond ſhould be void: and that here there was a capture, and a detention for one month. But upon conſideration, we think that a capture, within this condition, does not mean a *temporary capture*, but it *muſt be a total loſs*: now here it was not ſuch a capture as to occaſion a total loſs. The voyage was not loſt, for the defendant purſued it and earned his freight. Freight depends upon the ſafety of the ſhip; and as the freight was earned, the ſhip muſt have arrived ſafe at the port of deſtination. In whatever way we determine this caſe, there muſt be a hardſhip: but we are all of opinion, that the verdict is right, and that the rule for a new trial muſt be diſcharged."

From this caſe we not only learn what ſhall be deemed a capture, within the meaning of that word in a bottomry bond, but we derive from it a piece of very eſſential information, namely, that a lender on bottomry, or at reſpondentia, is neither entitled to the benefit of ſalvage, nor liable to contribute in caſe of a general average. This was expreſsly ſaid by Lord *Manſfield* in delivering the judgment of the court. His Lordſhip's opinion is confirmed by the ſtatute of the 19th of *George* the Second, c. 37. which allows the benefit of ſalvage to lenders upon ſhips or goods going to the *Eaſt Indies*; clearly ſhewing that there was no ſuch thing at the Common Law, otherwiſe there was no occaſion to make ſuch a proviſion.

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19 Geo. 2. c. 37. ſ. 5.

In this reſpect our law differs from that of *France*, for the ordinances, and indeed it ſeems always to have been the caſe in that country, expreſsly declare, that the lenders on bottomry ſhall be ſubject to general or groſs average, in the ſame manner as inſurers are upon policies of inſurance; for that as theſe contracts depend upon the ſame principles, they are ſubject to the ſame regulations.

Le Guidon, c. 19. Art. 5. 2 Valin, 19. 2 Emer. 504.

Our law in this reſpect is different alſo from that of *Denmark*. This lately appeared in a cauſe tried in the King's Bench before Lord *Kenyon* at *Guildhall*.

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It was an action on a policy of insurance upon a *respondentid* bond on ship and goods, at and from *B.* to *C.* The ship was *Danish*, and an average loss was sustained upon the goods to the amount of 6*l.* 15*s. per cent.* and the plaintiff, as holder of a *respondentia* bond, had been called upon to contribute; and now brought his action against the *English* underwriters for the amount of that contribution.

Wilpott v. Ewer, Sitt. after Trin 1789.

Lord *Kenyon* Chief justice.—"By the law of *England*, a lender upon *respondentia* is not liable to average losses; but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends, that as by the law of *Denmark*, such lenders upon respondentia are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The *Danish* Consul has proved that he received a judgment of the Court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side: but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight, than the opinions of advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems as if in this case, the underwriters were bound by the law of the country, to which the contract relates." Verdict for the plaintiff (*a*).

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(*a*) This is not the only case, in which the insurers have been held liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved; and upon that the learned judge much relied.

It was an action on a policy, upon a cargo of fish from *Newfoundland* to any port of *Spain*, *Portugal*, or *Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, presented a petition to the commercial court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which appears to be a very extraordinary one) adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third: and they also charged as a part of the general average, the seamen's wages and provisions, while in port. The defendant, as underwriter, had paid into court as much as would cover the average; if adjusted according to the memorandum in

Newman v. Cazalet, Sitt. at Guildh. after Hilary.

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It has been ſaid, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ſhip be loſt by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be diſcharged from his obligation. This has been decided in ſeveral caſes.

Weſtern v. Wildy, Skinn. 152.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that ſuch a ſhip was in the ſervice of the *Eaſt India Company*, and that it was to obey ſuch orders as they or their factors

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ſhould give; and that ſhe was deſigned for a voyage from *London* to *Bantam*, and from thence to *China* or *Formoſa*. The plaintiff lent 500*l.* upon the hull of the ſhip, and the defendant covenanted to pay, if the ſhip went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*; if from *London* to *Bantam*, and from thence to *China* or *Formoſa*, and returned to *London* within 24 months, 650*l.* If ſhe returned not within 24 months, then to pay 5*l.* *per* month above 650*l.* till the 36 months; and if ſhe returned not within 36 months, then to pay 710*l.* unleſs it can be proved by *Wildy*, that the ſhip returned not, but was loſt within 36 months. The ſhip, in fact, went from *London* to *Bantam*, and from *thence to Surat*, and other parts, and ſo returned to *Bantam*; and in her voyage from *Bantam* to *London*, was loſt within 36 months: upon which the preſent action was brought.

the policy, and the law and uſage of *England*. The queſtion was, whether the plaintiff having been compelled to pay beyond that ſum according to the calculation of the ſentence of the court of *Piſa*, it was concluſive upon the defendant, and the plaintiff was entitled to recover his average by the ſame ſtandard. The plaintiff called ſeveral brokers, who ſaid, that in repeated inſtances they had adjuſted averages under ſimilar ſentences of the court of *Piſa*; and the underwriters, though with reluctance, had always paid them.

Mr. Juſtice *Buller*,—"On the general law, the plaintiff would fail; but in all matters of trade, uſage is a ſacred thing. I do not like theſe foreign ſettlements of average, which make underwriters liable for more than the ſtandard of *Engliſh* law. But if you are ſatisfied it has been the uſage, upon the evidence given, it ought not to be ſhaken." The plaintiff had a verdict accordingly.

The

The court inclined to be of opinion, that this ſhip having deviated from the voyage deſcribed, in going to *Surat*, the plaintiff was not to bear the loſs, and was conſequently entitled to recover. They, however, took time to deliberate; and after conſideration, gave judgment for the plaintiff.

In another caſe of debt upon a bottomry bond, the defendant pleaded, that the ſhip went from *London* to *Barbadoes*, *ſine deviatione*, and afterwards ſhe returned from *Barbadoes* towards *London*, and in her return was loſt *in voyagio prædicto*; the plaintiff replied, that the ſhip in her return went from *Barbadoes* to *Jamaica*; and that after a ſtay there, ſhe returned from *Jamaica* towards *London*, and was loſt, and ſo ſhews a deviation. The defendant rejoined, that ſhe was preſſed into the king's ſervice, and ſo was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this that ſhe deviated after ſhe was preſſed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ſhip went from *London* to *Barbadoes* without deviation, and that in the return ſhe was loſt in the voyage aforeſaid: but it does not ſhew *without deviation*. Now the condition is ſo in expreſs words, and he ought to ſhew expreſsly that he has performed the words of the condition.

Williams v. Steadman, Holt's Reports, 126. Skin. 345. S. C.

The ſame rule of deciſion has been adopted in the Courts of Equity.

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1 Equity Caſes, Abr. 372. 2 Ch. Caſes, 130.

The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*: the ſhip was to go *from Holland to the Spaniſh iſlands, and to return to England*: but if ſhe periſhed, the defendant was to loſe his 50*l.* The ſhip went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africa*, then went to *Barbadoes*, and periſhed at ſea. The plaintiff, being ſued at law upon the bond, came into equity, ſuggeſting that *the deviation was through neceſſity*. But this bill was diſmiſſed, except as to the penalty.

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There is no reſtriction by the law of *England* as to the perſons, to whom money may be lent on bottomry, or at reſpondentia (*a*). In a former part of this work, we gave the hiſtory of a ſtatute introduced into our code of laws, to prevent inſurances from being made on the ſhips or goods of *Frenchmen*, during the then exiſting war with *France*. The ſame ſtatute alſo prohibited his majeſty's ſubjects from lending money on bottomry or at reſpondentia on any ſhips or goods belonging to *France*, or to any of the *French* dominions or plantations, or the ſubjects thereof: and in caſe they ſhould, ſuch contracts were declared void; and the parties thereto, or the agent or broker interfering therein, were to forfeit 500*l*. That act was not of long continuance, on account of the peace, which almoſt immediately followed it: and theſe reſtraints upon this ſpecies of contract were never again revived by any ſubſequent poſitive law (*b*).

C. 1. p. 14.

21 Geo. 2. c. 4.

Lex Merc. Red. 4th ed. p. 128.

It frequently happened, as appears by the preamble to the ſtatute, that the borrowers on bottomry, or at reſpondentia, became bankrupts after the loan of the money, and before the event happened, which entitled the lender to repayment: by which means the debt could not be proved under the commiſſion, and the lenders were left to ſuch redreſs as they could obtain from the bankrupt, who had previouſly given up every thing to his other creditors. This being likely to prove a diſcouragement to trade, parliament was obliged to interpoſe; and it accordingly enacted, "That the obligee in any bottomry "or reſpondentia bond, made and entered into upon a good "and valuable conſideration, *bonâ fide*, ſhould be admitted to "claim, and *after the contingency ſhould have happened, to prove* "*his or her debt or demands in reſpect of ſuch bond, in like manner* "*as if the contingency had happened before the time of the iſſuing* "*of the commiſſion of bankruptcy againſt ſuch obligor*, and ſhould

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19 Geo. 2. c. 37. ſ. 2.

(*a*) See one exception as to loans on the ſhips of foreigners trading to the *Eaſt Indies*, ante page 411.

(*b*) See the arguments as to the legality of inſuring the property of an enemy, ante p. 240, which neceſſarily tend alſo to prevent this ſpecies of contract from being entered into with an enemy.

"be

"be entitled unto, and ſhould have and receive a proportion- C. 30. A. P. 3
"able part, ſhare, and dividend of ſuch bankrupt's eſtate, in XXI.
"proportion to the other creditors of ſuch bankrupt, in like
"manner as if ſuch contingency had happened before ſuch
"commiſſion iſſued: and that all and every perſon or perſons,
"againſt whom any commiſſion of bankruptcy ſhould be
"awarded, ſhould be diſcharged of and from the debt or debts
"owing by him, her, or them, on every ſuch bond as afore-
"ſaid, and ſhould have the benefit of the ſeveral ſtatutes now
"in force againſt bankrupts, in like manner, to all intents
"and purpoſes, as if ſuch contingency had happened, and the
"money due in reſpect thereof had become payable before the
"time of the iſſuing of ſuch commiſſion."

By the ſtatute book it appears, that the maſters and mariners of ſhips having taken upon bottomry greater ſums of money than the value of their adventure, had been accuſtomed wilfully to caſt away, burn, or otherwiſe deſtroy the ſhips under their charge, to the great loſs of the merchants and owners: it was therefore enacted, "That if any captain, maſter, 16 Cha. 2. c. 6. f. 12.
"mariner, or other officer belonging to any ſhip, ſhould wil-
"fully caſt away, burn, or otherwiſe deſtroy the ſhip unto
"which he belonged, or procure the ſame to be done, he ſhould
"ſuffer death as a felon." The duration of this act having been limited to three years, it became extinct: but the neceſ- 22 & 23 Cha. 2. c. 11. ſ. 12.
ſity of ſuch a proviſion was ſo great, that a ſimilar law was made a few years afterwards, and is ſtill in force.

As the commerce of the country increaſed to an amazing degree, ſo the cuſtom of lending money on bottomry became alſo very prevalent: and as the lenders had ſubjected themſelves to great riſks, they began to think it neceſſary to protect their property, by inſuring to the amount of the money lent. In [428]
a former chapter, much was ſaid of the mode by which inſurances on ſuch property were to be effected; and we then ſaw from the caſe of *Glover* v. *Black*, that it was neceſſary to Vide ante, c. 1. 3 Burr. 1394.
inſert in the policy that the intereſt inſured was bottomry or reſpondentia; and that ſuch was the law and practice of mer-

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chants. From this caſe too it is evident, that when a perſon has inſured a bottomry or reſpondentia intereſt, and he recovers upon the bond, he cannot alſo recover upon the policy: becauſe he has not ſuſtained a loſs within the meaning of his contract; and to ſuffer any man to receive a double ſatisfaction, would be contrary to the firſt principles of inſurance law. As it is merely a contract of indemnity, a man ſhall never receive leſs; nor can he be entitled to recover more than the amount of the damage he has, in fact, ſuſtained.

A

CHAPTER THE TWENTY-SECOND.

Of Inſurance upon Lives.

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AN Inſurance upon Life is a contract, by which the underwriter for a certain ſum, proportioned to the age, health, profeſſion, and other circumſtances of that perſon, whoſe life is the object of inſurance, engages that the perſon ſhall not die within the time limited in the policy: or if he do, that he will pay a ſum of money to him in whoſe favour the policy was granted. Thus if *A.* lend 100 *l.* to *B.* who can give nothing but his perſonal ſecurity for repayment: in order to ſecure him, in caſe of his death, *B.* applies to *C.* an inſurer, to inſure his life in favour of *A.* by which means, if *B.* die within the time limited in the policy, *A.* will have a demand upon *C.* for the amount of his inſurance.

1 Poſtlethw. Dict. of Tr. p. 150.

Vide the Appendix, No. 3.

2 Blackſt Com. 459.

The advantages reſulting from ſuch inſurances are many and obvious: and moſt of them may be reduced under the following claſſes. To perſons poſſeſſed of places or employments for life; to maſters of families, and others, whoſe income is ſubject to be determined, or leſſened, at their reſpective deaths; who, by inſuring their lives, may ſecure a ſum of money for the uſe of their families. To married perſons, where a jointure, penſion, or annuity, depends on both or either of their lives, by inſuring the life of the perſons entitled to ſuch annuity, penſion, or jointure. To dependents upon any other perſon, during whoſe life they are entitled to a ſalary or benefaction, and whoſe life being inſured, will enable ſuch dependants, at the death of their benefactor, to claim from the inſurers a ſum equal to the premium paid. To perſons wanting to borrow money, who, by inſuring their lives, are enabled to give a ſecurity for the money borrowed. Theſe, and many other advantages, being ſo obvious, the Biſhop of *Oxford*, Sir *Thomas Allen*, and ſome other gentlemen, were induced to apply to Queen *Anne* to obtain her charter for incorporating them

1 Poſtlethw. 150.

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them and their ſucceſſors, whereby they might provide for their families, in an eaſy and beneficial manner. Accordingly, in the year 1706, her majeſty granted her royal charter, incorporating them by the name of "The Amicable Society for a perpetual "Aſſurance Office," giving them a power to purchaſe lands, an ability to ſue and be ſued in their corporate capacity, and a common ſeal for the more eaſy and expeditious management of the affairs of the Company.

The benefits, which accrued to the public from this ſpecies of contract, were found to be ſo extenſive, that another office was eſtabliſhed by deed enrolled in the Court of King's Bench at *Weſtminſter*, for the inſurance of lives only. The name of this office is the "*ſociety for equitable aſſurance on lives and ſur-* "*vivorſhips.*" Beſides this, the two Companies of the *Royal Exchange* and *London* Aſſurance, obtained his majeſty's charter, to enable them alſo to make inſurances on lives. The charter points out the advantages of ſuch inſtitutions; for it ſtates as the ground, on which ſuch a permiſſion is to be granted, "That "it has been found by experience to be of benefit and advan-"tage, for perſons having offices, employments, eſtates, or "other incomes, determinable on the life or lives of themſelves "or others, to make aſſurances on the life or lives, upon which "ſuch offices, employments, eſtates, or incomes are determi-"nable (*a*)." Private underwriters alſo may enter into poli-

(*a*) An act paſſed in the 39 *Geo.* 3. (ch. 83.) for incorporating a new inſurance company, called *The Globe Inſurance Company*, the ſecond ſection of which authorizes them (amongſt other things) to make inſurances on the life or lives of any perſon or perſons whomſoever; and to grant, purchaſe, and ſell annuities for lives, or in ſurvivorſhip, and grant ſums of money, payable at future periods within the kingdom of *Great Britain* or *Ireland*, and any other parts abroad, whether within his Majeſty's dominions or not; and ſhall and may receive depoſits of funds of tontine ſocieties and other inſtitutions eſtabliſhed for granting future advantages, and depoſits of funds belonging to, and act as treaſurer thereof for, benefit or friendly ſocieties, and other charitable and benevolent inſtitutions; and make proviſion for the widows and children of the clergy, and for clergymen, and receive depoſits from or on account of members of the induſtrious claſſes of ſociety, and others; and to make proviſion for members of the induſtrious claſſes of ſociety, and others, by allowing intereſt on ſuch depoſits made, or otherwiſe, upon ſuch terms and conditions, and in ſuch manner, as ſhall or may be agreed upon between the ſaid corporation ſo to be created and eſtabliſhed, and the perſons and ſocieties treating with the ſaid corporation, for the purpoſes thereinbefore mentioned.

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cies of this nature, as well as any other, provided the party making the insurance, chuses to trust their single security.

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The antiquity of this practice cannot be very easily ascertained; however, we find traces of it in some very old authors. In the *French* book, entitled *Le Guidon*, we find it mentioned, as a contract perfectly well known, at that time, in other countries. The author of that book, however, tells us in the same passage, that it was a species of contract wholly forbidden in *France*, as being repugnant to good morals, and as opening a door to a variety of frauds and abuses. Such, indeed, the law of *France* continues at this day: and insurances upon lives are prohibited in other countries of *Europe* by positive regulation. The same *French* author has, however, gone a little too far in asserting, that the other countries, in which they had been till that time encouraged, were also obliged to forbid them. This had not certainly taken place at that time, as may be inferred from the 66th article of the laws of *Wisbuy*: and in *England* they never had been prohibited. The learned *Roccus* also takes notice of them as legal contracts, and quotes various authors in support of his opinion,

Le Guidon, c. 16. art. 5. published in 1661.

2 Valin, 54.

2 Magens, 70.

Le Guid. loc. cit.

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Roccus de Assec. Not. 74.

These insurances being thus sanctioned in *England* by royal authority, and the funds of the different societies having very much increased, and being fixed on a stable and permanent foundation, contracts of this nature became so much a mode of gambling (for people took the liberty of insuring any one's life, without hesitation, whether connected with him, or not, and the insurers seldom asked any question about the reasons, for which such insurances were made) that it at last became a subject of parliamentary discussion. The result of that discussion was, that a statute passed, by which it was enacted, "That no "insurance should be made by any person or persons, bodies "politick or corporate, *on the life or lives* of any person or per- "sons, or on any other event or events whatsoever, wherein "the person or persons, for whose use, benefit, or on whose "account, such policies should be made, *should have no interest, "or by way of gaming or wagering*; and every insurance made, "contrary to the true intent and meaning thereof, should be "null

1 Mag. 33.

14 Geo. 3. c. 48. s. 1.

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"null and void to all intents and purposes." And in order more effectually to guard against any impoſition or fraud, and to be the better able to aſcertain, what the intereſt of the perſon, entitled to the benefit of the inſurance, really was, it was further enacted, by the ſame ſtatute, Sect. 2. "that it ſhould not be lawful "to make any policy or policies on the life or lives of any per-"ſon or perſons, or other event or events, without inſerting in "ſuch policy or policies, the perſon's name intereſted therein, "or for whoſe uſe, benefit, or on whoſe account, ſuch policy Sect. 3. "was ſo made or underwrote. And that in all caſes where the "inſured had an intereſt in ſuch life or lives, event or events, "no greater ſum ſhould be recovered, or received from the in-"ſurer or inſurers, than the amount or value of the intereſt "of the inſured in ſuch life or lives, or other event or events. Sect. 4. "That nothing in the act contained ſhall extend, or be con-"ſtrued to extend, to inſurances *bonâ fide* made by any perſon "or perſons, on ſhips, goods, or merchandizes; but every "ſuch inſurance ſhall be as valid and effectual in law, as if "this act had not been made."

[432] It has been held that a perſon, holding a note given for money won at play, has not an inſurable intereſt in the life of the maker of the note.

Dwyer v. Edie, London Sittings after Hil. 1788. An action was brought on a policy on the life of *James Ruſſell* from the 1ſt of *June* 1784 to the 1ſt of *June* 1785. *Ruſſell* was warranted in good health, and by a memorandum at the foot of the policy it was declared that it was intended to cover the ſum of 5000*l.* due from *Ruſſell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant: 1ſt, That part of the conſideration for the note was money won at play: 2dly, That *Ruſſell* at the time he gave the note was an infant.

Mr. Juſtice *Buller* nonſuited the plaintiff upon the ground of part of the conſideration of the note being for a gaming tranſaction; and therefore there was a want of intereſt in the plaintiff. But as to the other objection on account of infancy

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the intereſt muſt be contingent, for *Ruſſell* might or might not avoid his notes; and he doubted much whether till ſo avoided, the note muſt not be taken againſt a third perſon to be the note of an adult, for the maker of the note only could take the objection (*u*).

But a creditor has ſuch an intereſt in the life of his debtor, that he may inſure it, and recover upon the policy.—Thus in an action on a policy of inſurance on the life of *Lord Newhaven* from the 1ſt of *December* 1792 to the 1ſt of *December* 1793, the only queſtion made by the defendant was as to the plaintiff's intereſt, which it was contended was not ſufficient to take this caſe out of the ſtatute 14 *Geo.* 3. c. 48. It appeared in evidence that *Lord Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large ſum of money, part of which debt had been aſſigned by them to another perſon; the remainder, being more than the amount of the ſum inſured, was upon a ſettlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.

Anderſon v. Edie, B. R. London Sittings in Trinity Term 1795.

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Lord *Kenyon* was of opinion, that this debt was a ſufficient intereſt: and ſaid, that it was ſingular, that this queſtion had never been directly decided before. That a creditor had certainly an intereſt in the life of his debtor, the means by which he was to be ſatisfied may materially depend upon it, and in all events the death muſt in all caſes in ſome degree leſſen that ſecurity. Verdict for the plaintiff.

So alſo in a previous caſe, where an action was brought on a policy on the life of *William Holden* from the 13th *Auguſt* 1790 to *Auguſt* 1791, and during the life of the plaintiff,

Tidſwell v. Angerſtein, Peake's N. P. Caſes, 151.

(*u*) There is a caſe of *Roebuck* v. *Hammerton*, in which a policy made, in order to decide upon the ſex of a particular perſon, was held to fall within the prohibition of this ſtatute. In another caſe, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th *July* 1778, Lord *Manſfield* ſaid, that it was clear the plaintiff could not recover. 1ſt, Is this an intereſt within the act? It was made to prevent gambling policies. Every man in the kingdom has an intereſt in the events of war and peace; but I doubt whether that be an intereſt within the act. 2dly, The policy is void, by not having the name inſerted according to the ſecond ſection of the ſtatute.

Cowper, 737.

Mollifon v. Staples, Sittings at Guildhall. Mich. Vac. 1778.

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Holden had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to perſons not parties to this inſurance, having made the plaintiff executor of his will, and directed him to make aſſurance. Lord *Kenyon* thought this a ſufficient intereſt in the executor to ſupport the action. The cauſe proceeded, therefore: but the defendant had a verdict afterwards upon a different ground.

The remaining obſervations and rules upon this ſubject are very few and ſhort: becauſe thoſe general rules and maxims, upon which ſo much has been ſaid with regard to inſurances in general, are alſo applicable to this ſpecies of them: the ſame mode of conſtruction is to be adopted: fraud will equally affect the one as the other; the ſame attention muſt be paid to a rigid compliance with warranties; and the ſame rules of proceeding are to be followed.

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Vide the Appendix, No. 3.

With reſpect to the riſk, which the underwriter is to run, this is uſually inſerted in the policy; and he undertakes to anſwer for all thoſe accidents to which the life of man is expoſed unleſs the *ceſtuy que vie* put himſelf to death, or he die by the hand of juſtice. The policy, as to the riſk, generally runs in theſe words: "The ſaid inſurers, in conſideration of the ſum "paid, do aſſure, aſſume, and promiſe, that the ſaid *A. B.* ſhall, "by the permiſſion of Almighty God, live and continue in "this natural life for and during the ſaid term, or in caſe he "the ſaid *A. B.* ſhall, during the ſaid time, or before the full "end and expiration thereof, happen to die by any ways or "means whatſoever, ſuicide or the hands of juſtice excepted, "then, *&c.*" We ſee, that this contract expreſsly ſays, the death muſt happen within the time limited, otherwiſe the inſurers are diſcharged. But ſuppoſe a *mortal wound* is received during the exiſtence of the policy, and the perſon languiſhes till after the term limited in the contract, what ſays the law? Agreeably to the deciſion of this point, in caſes of marine inſurances, not only the cauſe of the loſs, but the loſs itſelf, muſt actually happen, during the time named in the policy, otherwiſe the inſurers are not reſponſible. This very caſe was put by Mr. Juſtice *Willes*, in his argument, when delivering the

Vide ante, c. 2. p. 31.

opinion of the court, in the case of *Lockyer* v. *Offley*. Suppose, said the learned judge, an insurance upon a man's life for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies after the year, the insurer would not be liable.

Vide ante, p. 33.

But when an insurance is made upon a man's life, who goes to sea, and the ship in which he sailed was never afterwards heard of, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence.

Thus in an action on a policy of insurance on the life of *L. Macleane* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778, it appeared in evidence that about the 28th of *November* 1777, *Macleane* sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war, which ship, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was, whether *Macleane* died before the 30th of *January* 1778. In order to establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Macleane*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost. That the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.

Patterson v. Black, Sittings at Guildhall, Hil. Vac. 1780.

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Lord *Mansfield* left it to the jury, whether, under all the circumstances, they thought the evidence sufficient to convince them, that *Macleane* died before the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff.

These insurances, when a loss happens upon them, must be paid according to the tenor of the agreement, in the *full sum* insured, as this sort of policy, from the nature of it, being on the

Lex Merc. Red. 4th edit. p. 294.

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We have ſeen that private perſons, as well as the public companies, may be underwriters upon policies on lives; and as they frequently became bankrupts after the policy was underwritten, but before a loſs happened, it became a queſtion, whether the perſons intereſted in ſuch inſurances could claim the money, and prove the debt, under the commiſſion, as if the loſs had happened before it iſſued. In the chapter immediately preceding this, and in one prior to that, we took occaſion to obſerve, that in order to remedy an inconvenience of this nature with reſpect to marine inſurances and bottomry bonds, a ſtatute had paſſed allowing creditors, either on ſuch policies, or bottomry and reſpondentia bonds, to prove their debts under the commiſſion, as if the loſs or contingency had happened prior to that event. But as the words of the preamble to that ſection of the ſtatute were ſpecial, referring only to inſurances on ſhips, and goods, or contracts of bottomry, it was doubtful whether it extended to inſurances on lives, although the words of the enacting part were very general, namely, "the aſſured in *any policy of aſſurance, &c.*" In ſupport of this doubt it was urged, that great inconveniences would follow from extending the ſtatute to theſe policies, becauſe the riſk may remain unſettled for a long and indefinite number of years. The court, however, held, that the general words of the enacting part were not reſtrained by the preamble.

Vide ch. 21. and ch. 14.

19 Geo. 2. c. 37. ſ. 2.

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Cox v. Liotard, B. R. Hil. 24 Geo. 3. Dougl. Rep. p. 166. note.

This doctrine was laid down in an action on a policy of inſurance on the life of *J. H. Boyd*, lately gone to the *Eaſt Indies*, on the event of his dying between the 5th of *April* 1780, and the 5th of *April* 1783. The defendant pleaded; 1ſt, Bankruptcy generally; and that the cauſe of action accrued before the bankruptcy: 2dly, That *the policy was made prior to the time of his becoming a bankrupt*, then the trading, petitioning creditor's debt, commiſſion, proceedings, and certificate were ſpecially ſet out, and that he was thereby diſcharged from the ſaid policy, and all debts due at the time of the bankruptcy, without ſaying, that the cauſe of action accrued before the bankruptcy. To this laſt plea there was a general demurrer.

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Lord *Mansfield*.—"The only question is, whether the *enacting words* of this statute, which are *general*, shall be restrained by the *preamble*, which is *particular*. I think they should not be restrained. The enacting clause comprehends *all* insurances, and consequently insurances *upon lives*. This is exactly the case of *Pattison* v. *Banks* (*a*); for there the preamble was *particular*, but the enacting clause was *general*."

Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurred.

Mr. Justice *Buller*.—"In the case of *Mace* v. *Cadell*, it was held, that the enacting words of the statute of 21 st of *Jq.* 1. c. 19. were not restrained by the preamble (*b*). The inconveniencies that have been urged, are not so great as are appre- [436] hended; for the creditors need not be delayed in their dividend. When a creditor has an insurance of this kind, he has nothing to do but to lay it before the commissioners, who will make a calculation, and lay aside as much as will give him a dividend equal to that of the other creditors. There must be judgment for the defendant."

It became a doubt in the reign of King *William*, when a policy on a life was to run from the day of the date thereof, till

(*a*) The question in *Pattison* v. *Banks* (*Cowper* Rep. 540) arose upon the 7 *Geo* 1. c. 31. which allowed persons, who had given credit on bills, bonds, notes, and other securities, payable at a future day, and which were not payable at the bankruptcy of the debtor, to prove them under the commission. The preamble to the statute speaks of securities only for the sale of goods and merchandizes; but as the enacting words were general, the court held, that they extended to a bond for the payment of an annuity for a term of years.

(*b*) The statute of *James* enacts, "that if any person, at such time as he shall become bankrupt, shall, *by the consent of the true owner*, &c. have in his possession, &c. any goods, &c. whereof he shall be reputed owner, the commissioners shall have power to sell the same in like manner as any other part of the bankrupt's estate." The preamble says, "whereas it often happens that many persons before they become bankrupts, *do convey their goods* to other men, upon good consideration, and yet retain the possession, and are reputed owners thereof, &c." The court in *Mace* v. *Cadell* (*Cowp.* 232) held, that the statute extended to the goods of a *third person*, which he allowed the bankrupt to keep possession of, as well as to those which *originally* belonged to the bankrupt, although the bankrupt speaks only of the bankrupt's *original* property.

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that day twelvemonth, and the perſon died on the day named, whether the inſurer was liable. The court held that he was. The caſe was this: A policy of inſurance was made to inſure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, about one o'clock in the morning. Lord *Holt* held that from the day of the date excludes the day, but from the date includes it (*a*); ſo that the day of the date muſt be excluded here, and the underwriter is liable.

Sir Robert Howard's Caſe, 2 Salkeld 625. 1 Ld. Raymond 480. S. C.

Although from a peruſal of the note below, it will appear that no difficulty could occur on ſuch a point at the preſent day; yet it is uſual, in order to prevent diſputes, to inſert in the modern policies "*the firſt and laſt days included.*"

Vide the Appendix, No. 3.

[437] Policies on lives are equally vitiated by fraud or falſehood, as thoſe on marine inſurances; becauſe they are equally contracts of good faith, in which the underwriter, from neceſſity, muſt rely upon the integrity of the inſured for the ſtatement of circumſtances. Indeed, the caſe of *Wittingham* v. *Thornborough*, which we took occaſion to cite in ſupport of the doctrine laid down in the chapter upon Fraud in Marine Inſurances, was a policy upon a life inſurance.—In another caſe, the principles of fraud were conſidered as far as it affects this contract.

Vide ante, 216.

Stackpole v. Simon, Sittings at Guildhall, Hilary Vac. 1779.

It was an action on a policy of inſurance for 150 *l.* at four guineas *per cent.* in caſe *Drury Sheppey* ſhould die at any time between the 1ſt of *April* 1777 and the 1ſt of *April* 1778, both days included, and during the life time of *John Sheppey*, the

(*a*) In the law books, not perhaps much to the honour of the profeſſion, this diſtinction taken by Lord *Holt* was at one time held to be law, at others not: ſometimes, theſe expreſſions were held to mean the ſame thing; at others to be quite different. In the year 1777, however, this glaring abſurdity was entirely done away, and the Court of King's Bench unanimouſly held, after much deliberation, that they mean the ſame thing; that they ſhall either be excluſive or incluſive, according to the context and ſubject matter, and ſhall be ſo conſtrued as moſt effectually to ſupport the deeds of the parties, and not to deſtroy them. See Lord *Mansfield*'s very elaborate argument upon this occaſion, in which all the caſes are fully ſtated and conſidered. *Pugh* v. the Duke of *Leeds*. *Cowper*'s Reports 714.

father

father of *Drury:* but in caſe the ſaid *John* ſhould die before the ſaid *Drury*, the policy to be void; the queſtion was, as to the repreſentation of the life at the time of the inſurance. The intereſt in the inſurance was 900*l.* due from *Drury Sheppey* to the plaintiff. It was admitted, that the life expired within the time limited in the policy. *Drury Sheppey* had a place in the Cuſtom-houſe of *Ireland*, and was in bad circumſtances. He went to the South of *France* for the benefit of his health, or to avoid his creditors, and there died. The broker, who effected the policy, told the underwriters that the gentleman, for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life.*

Lord *Mansfield.*—"As to the intereſt, this policy may be conſidered as a collateral ſecurity for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the riſk of its being a good life or not. If there be a concealment of the knowledge of the ſtate of the life, it is a fraud. It is a rule that every ſubſequent underwriter gives credit to the repreſentation made to the firſt; and it is allowed that any ſubſequent underwriter may give in evidence a miſrepreſentation to the firſt. The broker here does not pretend to any knowledge of his own, but ſpeaks from *information.* There is no fraud in him." There was a verdict for the plaintiff.

Even where there is an expreſs warranty, that the perſon is in good health, it is ſufficient that he is in a reaſonable good ſtate of health; for it never can mean, that the *ceſtui que vie* is [438] perfectly free from the ſeeds of diſorder. Nay, even if the perſon, whoſe life was inſured, laboured under a particular infirmity, if it can be proved by medical men, that it did not at all, in their judgment, contribute to his death, the warranty of health has been fully complied with; and the inſurer is liable.

Thus in an action on a policy made on the life of Sir *James Roſs* for one year, from *October* 1759 to *October* 1760, *warranted in good health at the time of making the policy:* the fact was, that Sir *James* had received a wound at the battle of *La*

Roſs v Bradſhaw, 1 Blackſt. Rep. p. 312.

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Feldt in the year 1747, in his loins, which had occaſioned a partial relaxation or palſy, ſo that he could not retain his urine or *fæces*, and which was not mentioned to the inſurer. Sir *James* died of a malignant fever within the time of the inſurance. All the phyſicians and ſurgeons, who were examined for the plaintiff, ſwore, that the wound had no ſort of connection with the fever; and that the want of retention was not a diſorder, which ſhortened life, but he might, notwithſtanding that, have lived to the common age of man: and the ſurgeons who opened him, ſaid, that his inteſtines were all ſound. There was one phyſician examined for the defendant, who ſaid, the want of retention was paralytick; but being aſked to explain, he ſaid, it was only a local palſy, ariſing from the wound, but did not affect life: but on the whole he did not look upon him as a good life.

Lord *Mansfield*.—"The queſtion of fraud cannot exiſt in this caſe. When a man makes inſurance upon a life generally, without any repreſentation of the ſtate of the life inſured, the inſurers take all the riſk, unleſs there was ſome fraud in the perſon inſuring, either by his ſuppreſſing ſome circumſtances, which he knew, or by alleging what was falſe. But if the perſon inſuring knew no more than the inſurer, the latter takes the riſk. In this caſe there is a warranty, and wherever that is the caſe, it muſt at all events be proved, that the party was a good life, which makes the queſtion on a warranty much larger than that on fraud. Here it is proved that there was no repreſentation at all, as to the ſtate of life, nor any queſtion aſked about it: nor was it neceſſary. Where an inſurance is upon a repreſentation, every material circumſtance ſhould be mentioned, ſuch as age, way of life, &c. But where there is
[439] a warranty, then nothing need be told; but it muſt in general be proved, if litigated, *that the life was, in fact, a good one, and ſo it may be, though he have a particular infirmity.* The only queſtion is, *whether he was in a reaſonable good ſtate of health, and ſuch a life as ought to be inſured on common terms.*" The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

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In a ſubſequent caſe, the ſame rule of deciſion was recommended and enforced. It was an action on a policy on the life of Sir *Simeon Stuart* Bart. from the 1ſt of *April* 1779 to the 1ſt of *April* 1780, and during the life of *Eliza Edgley Ewer*. This policy contained a warranty that Sir *Simeon* was about 57 years of age, *and in good health about the 11th of May* 1779, and that Mrs. *Ewer* was about 78 years of age. The defendant at the trial admitted, that Sir *Simeon* and *Mrs. Ewer* were of the reſpective ages mentioned in the warranty; that he died before the 1ſt of *April* 1780, and that ſhe was living. Two queſtions were intended to have been made; 1ſt, As to the plaintiff's intereſt: 2d, On the warranty of health. The former was diſpoſed of, by the plaintiff having proved a judgment debt. As to the latter, it appeared in evidence, that, although Sir *Simeon* was troubled with ſpaſms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was alſo proved by the broker, who effected the policy, that the underwriters were told, that Sir *Simeon* was ſubject to the gout. Dr. *Heberden* and other gentlemen of the faculty were examined, who proved that ſpaſms and convulſions were ſymptoms incident to the gout.

Willis v. Poole, Sitt. at Guildhall, Eaſter Vac. 1780.

Lord *Mansfield*.—"The imperfection of language is ſuch, that we have not words for every different idea; and the real intention of parties muſt be found out by the ſubject matter. By the preſent policy, the life is warranted, to ſome of the underwriters *in health*, to others *in good health*; and yet there was no difference intended in point of fact. *Such a warranty can never mean that a man has not the ſeeds of a diſorder.* We are all born with the ſeeds of mortality in us. A man, ſubject to the gout, is a life capable of being inſured, if he has no ſickneſs at the time to make it an unequal contract." There was a verdict for the plaintiff.

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In a former chapter we ſaw, that when the riſk is entire, and it is once begun, there ſhall be no apportionment or return of premium, though it ſhould ceaſe the very next day after it commenced. The ſame rule is applicable in every reſpect to the

Vide ante, c. 19.

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premium on life insurances; for the contract is entire, and if the person whose life is insured, should put an end to it the next day after the risk commences, though the underwriter is discharged, there would be no return of premium. This has never been decided in any judicial determination expressly on the point, but it has frequently been declared to be the law upon the subject by the learned judges in the course of argument, when return of premium on marine insurances was the point under discussion.

Cowper, 669. This was particularly done in the case of *Tyrie* v. *Fletcher*, by Lord *Mansfield*, when delivering the judgment of the court. "There has been an instance put," said his Lordship, "of a "policy where the measure is by time, which seems to me to "be very strong and apposite to the present case; and that is "an insurance upon a man's life for twelve months. There "can be no doubt but the risk there is constituted by the mea- "sure of time, and depends entirely upon it: for the under- "writer would demand double the premium for *two* years, "that he would take to insure the same life for one year only. "In such policies, there is a general exception against suicide. "If the person puts an end to his own life the next day, or a "month after, or at any other period within the twelve months, "there never was an idea in any man's breast, that part of the "premium should be returned."

Douglas, 789. Afterwards in the case of *Bermon* v. *Woodbridge*, Lord *Mansfield* laid down the same doctrine. "In an insurance upon a "life, with the common exception of suicide, and the hands "of justice, if the party is executed, or commit suicide, in "twenty-four hours, there shall be no return."

From these opinions, which have been frequently repeated in other cases, the law upon the subject of return of premiums, as applicable to life insurances, seems perfectly ascertained: because except in the case of suicide or a publick execution, the question can never arise.

CHAPTER THE TWENTY-THIRD.

Of Inſurance againſt Fire.

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AN inſurance of this ſort is a contract, by which the inſurer in conſideration of the premium which he receives, undertakes to indemnify the inſured, againſt all loſſes, which he may ſuſtain in his houſe, or goods, by means of fire, within the time limited in the policy. To enter upon a detail of the various advantages, which mankind have derived from this ſpecies of contract, would be a waſte of time; becauſe they are obvious to every underſtanding. As little does it fall within the compaſs of my plan to enumerate the various offices that have been inſtituted for the purpoſe of inſuring property againſt fire; or the rules and regulations, by which they are ſeverally governed. Some of them have been inſtituted by royal charter; others by deed inrolled; and others give ſecurity upon land for the payment of loſſes. The rules, by which theſe ſocieties are governed, are eſtabliſhed by their own managers, and a copy given to every perſon at the time he inſures; ſo that, by his acquieſcence, he ſubmits to their propoſals, and is fully apprized of thoſe rules upon the compliance or non-compliance with which he will or will not be entitled to an indemnity.

See 1 H. Blackſt. 254.

The conſtruction to be put upon thoſe regulations has but ſeldom become the ſubject of judicial enquiry; three inſtances only having occurred in our reſearches upon this occaſion. In the propoſals of the *London* Aſſurance Company, and ſome of the other offices, there is a clauſe by which it is provided, that they do not hold themſelves liable for any loſs or damage by fire, happening by any invaſion, foreign enemy, *or any military or uſurped power* whatſoever. It became a queſtion, what ſpecies of inſurrection ſhould be deemed a military or uſurped power within the meaning of this proviſo. It was held by the court of Common Pleas, againſt the opinion of Mr. Juſtice *Gould*, that it could only mean to extend to houſes ſet on fire by means of

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an invaſion from abroad, or of an internal rebellion, when armies are employed to ſupport it.

Drinkwater v. the Corporation of the London Aſſurance, 2 Wilſon 363.

The caſe in which this queſtion aroſe, was an action of covenant againſt the defendants upon a policy of inſurance of a malting office of the plaintiff's at *Norwich* from fire, in which policy there was a proviſo that the corporation ſhould not be liable in caſe the ſame ſhall be burnt by any invaſion by foreign enemies, or any military or uſurped power whatſoever, and that the defendants had not kept their covenants, to the plaintiff's damage. The defendants plead firſt the general iſſue, that they have not broke their covenants, and thereupon iſſue is joined. 2dly, They plead that it was burnt *by an uſurped power*; the plaintiff replies, that it was not burnt by *an uſurped power*, and thereupon iſſue is alſo joined. This cauſe was tried at *Norwich* aſſizes; a verdict was given for the plaintiff, and 469*l.* damages, ſubject to the opinion of the court, upon the following caſe, viz. That upon *Saturday* the 27th of *November*, a mob aroſe at *Norwich* upon account of the high price of proviſions, and ſpoiled and deſtroyed divers quantities of flour; thereupon the proclamation was read, and the mob diſperſed for that time. Afterwards another mob aroſe, and burnt down the malting office in the policy mentioned. The queſtion is, whether the plaintiff is entitled to recover in this action. This caſe was twice argued at the bar, and the court took time to deliberate; after which, as the judges differed in opinion, they delivered their opinions *ſeriatim*.

Mr. Juſtice *Gould* was of opinion, that the malting office being burnt by the mob, who roſe to reduce the price of proviſions, the ſame was burnt by an *uſurped power*, within the true intent and meaning of the proviſo in the policy: to ſhew that it was an uſurped power for any perſons to aſſemble themſelves, to alter the laws, to ſet a price upon victuals, &c. he cited *Popham* 122, where it is agreed by the juſtices, that to attempt ſuch a thing by force is felony, if not treaſon; and therefore judgment ought to be for the defendant.

Mr. Juſtice *Bathurſt*.—"The words "*uſurped power*," in the proviſo, according to the true import thereof, and the meaning

meaning of the parties, can only mean an invaſion of the kingdom by foreign enemies to give laws and uſurp the government thereof, or an internal armed force in rebellion, aſſuming the power of government by making laws, and puniſhing, for not obeying thoſe laws. The plea alleges that the malting office was burnt by *an uſurped power* unlawfully exerciſed, but does not charge *that* uſurped power as a rebellion; that a mob roſe at *Norwich* on account of the price of victuals, and as ſoon as the proclamation was read, they diſperſed; therefore judgment ought to be for the plaintiff."

Mr. Juſtice *Clive*.—"The words muſt mean ſuch an uſurped power as amounts to high treaſon, which is ſettled by the 25th of *Edward* Third. The offence of the mob in the preſent caſe was a felonious riot, for which the offenders might have ſuffered; but it cannot be ſaid to be an uſurped power; therefore I am of opinion that judgment ſhould be given for the plaintiff."

Lord Chief Juſtice *Wilmot*.—"Upon the beſt conſideration I am able to give this caſe, I am of opinion, that the burning of the malting office, was not a burning by *an uſurped power* within the meaning of the proviſo. Policies of inſurance, like all other contracts, muſt be conſtrued according to the true intention of the parties. Although the counſel on one ſide ſaid, that policies ought to be conſtrued liberally; on the other ſide, that they ought to be conſtrued ſtrictly; in a doubtful caſe I think the turn of the ſcale ought to be given againſt the ſpeaker, becauſe he has not fully and clearly explained himſelf. The imperfection of language to expreſs our ideas is the occaſion that words have equivocal meanings; and it is often very uncertain what the parties to a contract in writing mean. When the ideas are ſimple, words expreſs them clearly; but when they are complex, difficulties often ariſe: and men differ much about the ideas intended to be conveyed by words: In the preſent caſe, what is the true idea conveyed to the mind by the words *uſurped power*? The rule to find it out is to conſider the words of the context, and to attend to the popular uſe of the words, according to *Horace*, *Arbitrium eſt*,

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et jus, et norma loquendi. My idea of the words, *burnt by an uſurped power*, from the context is, that they mean burnt or ſet on fire by occaſion of an invaſion from abroad, or of an internal rebellion, when armies are employed to ſupport it, when the laws are dormant and ſilent, and firing of towns are unavoidable; theſe are the outlines of the picture drawn by the idea, which theſe words convey to my mind. The time of the incorporation of this ſociety of the *London* Aſſurance Company, was ſoon after a rebellion in this kingdom, and it was not ſo romantic a thing to guard againſt fire by rebellion, as it might be now; the time, therefore, is an argument with me that this is the meaning of theſe words. Rebellious mobs may be alſo meant to be guarded againſt by the proviſo, becauſe this corporation commenced ſoon after the riot act; and if common mobs had been in their minds, they would have made uſe of the word *mob*. The words "*uſurped power*," may have a great variety of meanings according to the ſubject matter where they are uſed, and it would be pedantic to define the words in their various meanings; but in the preſent caſe, they cannot mean the power uſed by a common mob. It has not been ſaid, that if one, or fifty perſons had wickedly ſet this houſe on fire, that it would be within the meaning of the words *uſurped power*. It has been objected that here was an *uſurped power* to reduce the price of victuals, but this is part of the power of the crown; and therefore it was an *uſurped power*: but the king has no power to reduce the price of victuals. The difference between a rebellious mob, and a common mob, is, that the firſt is high treaſon; the latter a riot or a felony. Whether was this a common or a rebellious mob? The firſt time the mob riſes, the magiſtrates read the proclamation, and the mob diſperſe; they hear the law and immediately obey it. The next day another mob riſes on the ſame account, and damages the houſes of two bakers; thirty people in fifteen minutes put this army to flight, they were diſperſed and heard of no more. Where are the *ſpecies belli* which Lord *Hale* deſcribes? This mob wants an univerſality of purpoſe to deſtroy, to make it a rebellious mob, or high treaſon. 1 *Hale's* P. C. 135. There muſt be an univerſality, a purpoſe to deſtroy *all* houſes, *all* incloſures, *all* bawdy houſes,

houſes, &c. Here they fell upon two bakers and a miller, and the mob chaſtiſed theſe particular perſons to abate the price of proviſions in a particular place: this does not amount to a rebellious mob. When the laws are executed with ſpirit, mobs are eaſily quelled; ſometimes a courageous act done by a ſingle perſon, will quell and diſperſe a mob. And ſometimes the wiſdom of an individual will do the ſame, as is thus beautifully deſcribed by *Virgil*,

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Ac veluti magno in populo cum ſæpe coorta eſt
Seditio, ſævitque animis ignobile vulgus,
Jamque faces et ſaxa volant: furor arma miniſtrat.
Tum pietate gravem, ac meritis, ſi forte virum quem
Conſpexêre, ſilent, arrectiſque auribus adſtant:
Ille regit dictis animos, et pectora mulcet.

But amongſt armies, the laws are ſilenced, and the wiſdom or courage of an individual will ſignify nothing. Upon the whole, I am of opinion, that there muſt be judgment for the plaintiff: and accordingly the *poſtea* was ordered to be delivered to the plaintiff, by three judges againſt one.

The Sun Fire Office has uſed words of a larger and more extenſive import than thoſe, which were the ſubject of diſcuſſion in the laſt caſe; for the proprietors of that company declare, that they will not pay any loſs or damage by fire, happening by any invaſion, foreign enemy, *civil commotion*, or any military or uſurped power whatſoever. A caſe has *unfortunately* ariſen, in which the meaning of theſe words, *civil commotion*, has been the ſubject of judicial enquiry.

An action was brought on a policy of inſurance to recover from the Sun Fire Office a ſatisfaction for damage done to the plaintiff's houſes and goods by the rioters, who, it is very well known, and hiſtory will inform poſterity, in *June* 1780, to the terror and diſmay of the inhabitants of *London*, traverſed that city for ſeveral days burning and deſtroying *Roman Catholick* chapels, publick priſons, and the houſes of various individuals; the oſtenſible purpoſe of their aſſembling being to procure the re-

Langdale v. Maſon and others, Sittings at Guildhall, Mich. Vac. 1780.

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peal of a wife and humane law, (which had paſſed for ſome indulgences to *Roman Catholicks*), and who were at laſt only diſperſed by military force. As the circumſtances of theſe riots were very recent, they were not minutely gone into at the trial. It was, however, ſufficiently proved, that the

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plaintiff, on account of his religion, (being a *Roman Catholick*), had been, amongſt others, ſelected as an object of the rage of the times, and that his houſes and effects were ſet on fire. The office defended this action, conſidering that they were protected by the article juſt recited, namely, " That they would " not anſwer for any loſs, occaſioned by an invaſion, foreign " enemy, *civil commotion*, or any military or uſurped power " whatever." This point was argued much at length by the counſel on both ſides.

Lord *Mansfield*.—" Gentlemen of the jury, this is an action brought by the plaintiff againſt the defendants upon the policy of inſurance mentioned in the pleadings, for the value of property, which was conſumed by fire. Moſt undoubtedly every man's leaning muſt be to the ſide of the plaintiff, in order to divide the loſs in ſo great a calamity. But that leaning muſt be governed by rules of law and juſtice: and the only queſtion, that ariſes for your determination and that of the court, is ſingly upon the conſtruction of two words in the policy. It will be neceſſary, in order to inveſtigate this matter, to go into the hiſtory, which has been opened and explained to you, of other inſurance policies. In the year 1720, the *London* Aſſurance Company put into their policies all the words here uſed, except *civil commotion*. Whatever fire happens by a foreign enemy is clearly provided againſt: when they burn houſes, or ſet fire to a town, that is alſo provided for. What is meant by military or uſurped power? They are ambiguous; and they ſeem to have been the ſubject of a queſtion and determination. They muſt mean rebellion, where the fire is made by authority: as in the year 1745, the rebels came to *Derby*, and if they had ordered any part of the town, or a ſingle houſe to be ſet on fire, that would have been by authority of a rebellion. That is the only diſtinction in the caſe—it muſt be by rebellion got to ſuch a head, as to be under authority.

Vide ſupra.

thority. In the year 1726, ſome years after the *London* Aſſurance Company had done it, the Sun Fire Office put in the exception; and in 1727, they put in other words: they do not keep to the form of the *London* Aſſurance: they do not ſay by invaſion from foreign enemies merely: they clearly provide againſt rebellion, determined rebellion, with generals who could give orders. Though this be ſo guarded, the Sun Fire Office did not [447] think it anſwered their purpoſe; and therefore they took the words *civil commotion*. Not only uſing thoſe words, applicable to guard againſt a foreign enemy, againſt a rebellion, where there are officers and leaders, that can give authority and power; but they add other words as general and untechnical as can poſſibly be uſed: *civil commotion*, not civil commotion that amounts to *high treaſon*. They avoid ſaying civil commotions that amount to felony: they avoid ſaying civil commotions that amount to *miſdemeanors*: but they uſe a general expreſſion "if the miſchief happens from a civil commotion," taking the largeſt and moſt general ſenſe of the words that the language will allow: they do not even ſay a *riot*. It may be a queſtion in point of law, whether an aſſembly or multitude be a riot. In that caſe, they do not ſay committing a felony, but ſpeak of fire occaſioned by civil commotion. The ſingle queſtion is, whether this has been a civil commotion. If there be a caſe, to which theſe words can be applicable, it is to a caſe of this ſort. I cannot ſee any of the other words, to which it can be applied. Uſurped power takes in rebellion, acting by uſurped powers amongſt themſelves. From a foreign enemy the office is ſecured. But what is a civil commotion? it is ſomething elſe. The preſent was an inſurrection of the people reſiſting all law, ſetting the protection of the government at nought, taking from every man, who was the object of their reſentment, that protection, as appears from the evidence given by the witneſſes upon the facts, and which you all know as well as if no witneſſes had been produced. What was the object and end of this violent inſurrection? It took place in many parts of the town at the ſame time, and the very ſame night; the mob were in *Broad-ſtreet*, *St. Catherine*'s in *Colman-ſtreet*, at *Blackfriars' Bridge*, and at the plaintiff's. What is the object? *General deſtruction, general confuſion. It certainly was meant*

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meant to aim at the very vitals of the conſtitution. It was not a private matter, under the colour of *popery* only, to deſtroy all Papiſts under a pretence or a cry of *No popery*. But the general object was *deſtruction* and *confuſion*. The Fleet Priſon was burnt down: Newgate was burnt down the night before. The King's Bench Priſon is burnt, and all the priſoners ſet at liberty. The new Bridewell is burnt; the Bank attacked: conſider the conſequences, if they had ſucceeded in deſtroying

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the Bank of *England*. The Exciſe and Pay Offices in *Broad-ſtreet* were threatened. Military reſiſtance, and an extraordinary ſtretch were made and juſtified by neceſſity. There was a great deal of firing, many men were killed; and the houſes of a vaſt number of Papiſts were burnt and deſtroyed. What is this but a *civil commotion?* No definition has been attempted to be given of what it is. It is ſaid, that this is a civil commotion diſtinct from uſurped power and rebellion. It is admitted, that this kind of inſurrection may amount to high treaſon: and, to be ſure, it may. But the office do not put their expectation upon trying, whether they were guilty of high treaſon or not. There is no manner of doubt, that this was an inſurrection for a grand purpoſe, to take from a ſet of men the protection of the law. That is levying war againſt the king; there is not any doubt of it. It is not put upon that, but on the ground of a civil commotion. It is not an occaſional riot, that would be another queſtion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this caſe bring it within the idea of a civil commotion. I think a civil commotion is this; an inſurrection of the people for general purpoſes, though it may not amount to a rebellion, where there is an uſurped power. If you think it was ſuch an inſurrection of the people for the purpoſes of general miſchief though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiff." The jury, agreeably to the Chief Juſtice's direction, found for the defendants (*a*).

When

Tarleton and others v. Staniforth, 5 Term Rep. 695.

(*a*) In a policy of inſurance againſt loſs by fire from half a year to half a year, the inſured agreed to pay the premium half-yearly "as long as the aſſurers ſhould agree

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When a fire happens, and the party ſuſtains a loſs in conſequence of it, he is bound by the printed propoſals of moſt of the societies, to give immediate notice thereof to the office in which he is inſured; and as ſoon as poſſible afterwards, or within a limited time according to the regulations of ſome, to deliver in as particular an account of his loſs, or damage, as the nature of the caſe will admit; and make proof of the ſame by his oath or affirmation, by books of accounts, or ſuch other vouchers as ſhall be required, or as ſhall be in exiſtence. It is alſo neceſſary that the inſured ſhould procure a certificate under the hands of the miniſters and churchwardens, together with ſome other reputable inhabitants of the pariſh, not concerned in ſuch loſs, importing, that they are well acquainted with the character and circumſtances of the ſufferer or ſufferers; and do know, or verily believe, that he, ſhe, or they, have really, and by misfortunes ſuſtained by ſuch fire the loſs and damage therein mentioned (*a*). When any loſs is ſettled and adjuſted, the ſufferers are to receive immediate ſatisfaction, without any deduction.

See the printed propoſals of the different Fire Offices.

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agree to accept the ſame, *within 15 days after the expiration of the former half year*;" and it was alſo ſtipulated that no inſurance ſhould take place till the premium was actually paid; a loſs happened within 15 days after the end of one half year, but before the premium for the next was paid; and it was held that the aſſurers were not liable, though the aſſured tendered the premium before the end of the 15 days, but after the loſs.

The defendants in the above cauſe were members of a ſociety at Liverpool, for the inſurance of property from fire: but ſoon after the deciſion, the Royal Exchange Aſſurance Company, the Phœnix, and ſome other Inſurance Companies, gave notice that they did not mean to take advantage of the judgment ſo pronounced, but would hold themſelves liable for any loſs during the 15 days that were allowed for the payment of the inſurance upon annual policies, and all other policies for a longer period. But that policies for a ſhorter period than a year would ceaſe at ſix o'clock in the evening of the day mentioned in the policy.

(*a*) Since the three former editions of this work were publiſhed, it has been held by the Court of King's Bench upon a writ of error from the Court of Common Pleas, that the printed propoſals, containing the above clauſe, are to be conſidered as part of the policy: and that the procuring ſuch a certificate is a condition *precedent* to the right of the aſſured to recover, and cannot be diſpenſed with, even though the miniſter and churchwardens wrongfully refuſe to grant the certificate.

Worſley v. Wood, 6 Term R. 701. 2 H. Blackſt. 574. S. C. See alſo Routledge v. Burrell, 1 H. Blackſt. 254. and Oldman v. Bewick, 2 H. Black. 577. note (*a*).

In

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Beawes 4th edit. p. 294. Vide p. 434.

In the *Lex Mercatoria* it is ſaid, that policies on houſes and lives admit of no *average*. That this is true of the latter cannot be denied, as we have already ſhewn in the preceding chapter; becauſe the payment of the whole ſum depends upon one ſingle event, which muſt *wholly* happen, or not at all. But that it cannot be true of inſurances againſt fire either of houſes or goods is equally clear; for houſes may be *partially* damaged, and goods may be *partially* deſtroyed. In which caſe, as inſurance is a contract of indemnity, the end of the contract is anſwered by putting the party in the ſame ſituation in which he was before the accident happened. But if he were to recover the whole ſum inſured, he would be in a better ſituation, which the law will not allow. Indeed, from the above quotation from the printed propoſals it is evident, that the offices conſider themſelves liable for partial loſſes. Nay, ſome of them, if not all, expreſsly undertake to allow all reaſonable charges, attending the removal of goods, in caſes of fire, and to pay the ſufferer's loſs, whether the goods are deſtroyed, loſt, or damaged by ſuch removal.

Royal Exchange Aſſurance Company, Sun Fire Office, Phœnix Fire Office, &c.

Theſe policies of inſurance are not in their nature aſſignable, for they are only contracts to make good the loſs, which the contracting party himſelf ſhall ſuſtain; nor can the intereſt in them be transferred from one perſon to another without the conſent of the office (*a*). There is a caſe in which, by the propoſals, theſe policies are allowed to be transferred, and that is, when any perſon dies, the policy and intereſt therein ſhall continue to the heir, executor, or adminiſtrator, reſpectively, to whom the property inſured ſhall belong; provided, before any new payment be made, ſuch heir, executor, or adminiſtrator, do procure his or her right, to be indorſed on the policy at the ſaid office, or the premium be paid in the name of the ſaid heir, executor, or adminiſtrator. But in all other caſes there can be no aſſignment; and the party claiming an indemnity muſt have an intereſt in the thing inſured at the time of the loſs. Theſe points were decided in two cauſes, one before Lord Chancellor *King*, and the other before Lord *Hardwicke*.

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(*a*) But in marine inſurances, the policy may be transferred. Delaney v. Stoddart. 1 Term R. 26.

On

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Lynch and another v. Dalzell and others, 3 Brown's Parl. Cases, 497.

On the 28th of *July* 1721, one *Richard Ireland* took out from the Sun Fire-Office, a policy of Inſurance, whereby it was witneſſed, that whereas the ſaid *Ireland* had agreed to pay, or cauſe to be paid to the ſaid office, the ſum of five ſhillings within fifteen days after every quarter-day, for the inſurance of his houſe, being the *Angel* Inn at *Graveſend*, with his goods and merchandize as therein-after expreſſed only, and not elſewhere, viz. the dwelling-houſe, not exceeding 400 *l.* and for the goods in the ſame only, not exceeding 500 *l.*; and for the ſtable only, not exceeding 100 *l.* all then occupied by *James Peck*, from loſs and damage by fire; and ſo long as the ſaid *Richard Ireland* ſhould duly pay or cauſe to be paid five ſhillings a quarter, as therein mentioned, the ſaid ſociety did bind themſelves, their heirs, executors, adminiſtrators, and aſſigns, to pay and ſatisfy the ſaid *Ireland*, his executors, adminiſtrators, and aſſigns, within fifteen days after every quarter-day, in which he ſhould ſuffer by fire, his loſs not exceeding 1000 *l.* according to the exact tenor of their printed propoſals. The policy was ſubſcribed the 28th of *July* 1721, by three of the truſtees of the ſociety. Some conſiderable time afterwards, *Richard Ireland* died, having made his will, and *Anthony* his ſon ſole executor; who brought the policy to the office, and had an indorſement made thereon, that the ſame then belonged to him: and afterwards, namely, at or about *Chriſtmas* 1726, he, the ſaid *Anthony*, paid the office a premium of twenty ſhillings for one year's inſurance, from *Chriſtmas* 1726, to *Chriſtmas* 1727, as by an article in the propoſals, he was at liberty to do. On the 24th of *Auguſt* 1727, a fire happened at *Graveſend*, which, among others, deſtroyed the houſe mentioned in the policy; and ſome time afterwards the appellants applied to the office, and alleged, that they had purchaſed the houſe and goods of *Anthony Ireland*; that the ſame were their property at the time of the fire, and that they had an aſſignment of the policy made to them, at the ſame time that the houſe and goods were aſſigned; and they produced an affidavit made by the appellant, *Roger Lynch*, in which he ſwore, that his loſs and damage by burning the ſaid houſe, amounted, at a moderate computation, to 500 *l.* and upwards; and upon this affidavit was indorſed a certificate of the miniſter, churchwardens, and other inhabitants of *Graveſend*, that they

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verily believed, according to the beſt of their information, the appellants had ſuſtained a loſs of 500 *l.* and upwards. But neither in the affidavit or certificate, was any mention made of any loſs being ſuſtained by the appellants by the burning of any goods in the ſaid houſe; nor was any affidavit made by *Anthony Ireland*, in whom the property of the policy was, that he had ſuffered any loſs. The appellants, however, inſiſted that the office ſhould pay them 1000 *l.* for their loſs ſuſtained by the burning of the houſe and goods; and they accordingly filed a bill in Chancery, ſetting forth, that *Anthony Ireland* agreed to ſell and aſſign to the appellants the houſe, ſtables, and goods, and alſo, at the ſame time agreed to aſſign the policy; and that by indenture of the 24th of *June* 1727, for 250 *l.* *Ireland* did aſſign to the appellants a leaſe he had of the houſe and ſtables for the reſidue of a term of 70 years, which commenced at *Midſummer*, 16 *Car.* 2.; but the goods, for which the appellants, as they alleged, were to pay 500 *l.* being intended for one *Thomas Church*, who was to hold the inn under the appellants, *Ireland*, by deed poll of the ſame date, ſold the ſame to *Church* for his own uſe. The bill alſo ſtated, that by another writing of equal date, *Ireland* aſſigned the policy, and all money and benefit thereof, to the appellants. That although the bill of ſale of the houſhold goods was made to *Church*, yet, as the appellants paid the purchaſe money for the ſame, *Church* aſſigned his bill of ſale to them, for ſecuring the money they had paid for the goods; and afterwards, by another writing, releaſed to the appellants his benefit and intereſt in the policy. The bill prayed ſatisfaction.

The reſpondents put in their anſwer, in which they ſet forth the nature and method of the inſurances made by the office, and admitted the policy in queſtion, and the appellants application for 1000 *l.* loſs: but ſaid, that the affidavit produced was not agreeable to the propoſals; and that they had been informed and believed, that no aſſignment of the policy was made to the appellants, nor any aſſignment of goods made to them by *Church*, till after the fire. They inſiſted, that the policies, iſſued by the office, were not, in their nature, aſſignable, the ſame being only contracts to make good the loſs which the contracting party himſelf ſhould ſuſtain: and the policy in queſtion was firſt

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made

made to *Richard Ireland*, to pay *his* loſs, and was afterwards declared by indorſement to belong to *Anthony Ireland*; and that no other perſon was entitled to the benefit of it. The cauſe proceeded to iſſue, and witneſſes were examined on both ſides; and upon the appellants own evidence it appeared, that the firſt diſcourſe between the appellants and Mr. *Ireland* about the policy, was after the execution of the aſſignment of the houſe, and that the agreement (if there was any) about the policy was not, at the time when the appellants agreed to purchaſe *Ireland*'s term in the houſe. It appeared further, that the aſſignment of the policy, though bearing date *before*, was not made and executed till ſome time *after* the fire: ſo that the agreement for aſſigning the policy was a voluntary conceſſion of *Ireland* without any conſideration, and independent of the bargain for the houſe, and never made till after *Ireland*'s intereſt in the policy, as to the houſe, was determined, by his ſelling his intereſt in the thing inſured, and not carried into execution till the thing was loſt. As to the appellants property in the goods, they proved an aſſignment from *Church* to them, as a ſecurity for 300*l.* but omitted, in their interrogatories, the material queſtion, *when this aſſignment was made:* though the reſpondents, by their anſwer, put the time plainly in iſſue, by inſiſting, that it was after the fire; and it did not appear that the appellants ever had any property in the goods. The reſpondents on their part proved, that the office did not inſure any perſons longer than they continued their property in the thing inſured, and that perſons dealing with them might not be miſtaken, ſuch notice was uſually given.

Lord Chancellor *King*.—"Theſe policies are not inſurances of the ſpecifick things mentioned to be inſured; nor do ſuch inſurances attach on the realty, or in any manner go with the land as incident thereto, by any conveyance or aſſignment: but they are only ſpecial agreements with the perſons inſuring, [453] againſt ſuch loſs or damage as they may ſuſtain. The party inſuring muſt have a property at the time of the loſs, or he can ſuſtain no loſs; and conſequently can be entitled to no ſatisfaction. There was no contract ever made between the office and the appellants for any inſurance on the premiſes in

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queſtion. Not only the expreſs words, but the end and deſign of the contract with *Ireland* do, in caſe of any loſs, limit and reſtrain the ſatisfaction to ſuch loſs as ſhould be ſuſtained by *Richard Ireland* only; and the indorſement on the policy declared that right to his executor *Anthony Ireland* only. Theſe policies are not in their nature aſſignable; nor is the intereſt in them ever intended to be transferrable from one to another, without the expreſs conſent of the office. The tranſactions in the preſent caſe, by changing their property backwards and forwards, and rendering it uncertain whoſe the true property is, raiſe a ſuſpicion, and fully juſtify the caution of the office, in preventing the aſſignment without conſent of the managers, which method is purſued by all the inſurance offices. Beſides, the appellants' claim is at beſt founded only on an aſſignment never agreed for till the perſon inſured had determined his intereſt in the policy, by parting with his whole property, and never executed till the loſs had actually happened." His lordſhip therefore diſmiſſed the bill.

Upon this decree there was an appeal to the Houſe of Lords; and after hearing counſel on both ſides, it was ORDERED AND ADJUDGED, that the ſame ſhould be diſmiſſed, and the decree therein complained of affirmed.

A few years afterwards this caſe was cited with approbation by Lord *Hardwicke*, and relied upon by him as the ground of his opinion.

The Sadlers Company v. Badcock and others. 2 Atkyns 554.

Anne Strode, having ſix years and a half to come in a leaſe of a houſe from the plaintiffs, on the 27th of *April* 1734, became a proprietor of the Hand-in-hand Office, by inſuring the ſum of 400*l.* on the houſe, for ſeven years; and on paying twelve ſhillings down, and three pounds ſome time after, the Company agreed, "to raiſe and pay, out of the effects of the contribution [454] "ſtock, the ſaid ſum of 400*l.* to her, and her executors, ad- "miniſtrators, and aſſigns, ſo often as the houſe ſhall be burnt "down within the ſaid term, unleſs the directors ſhould build "the ſaid houſe, and put it in as good plight as before the fire;

" and on the back of the policy it was indorſed, that if this po-
" licy ſhould be aſſigned, the aſſignment muſt be entered within
" twenty-one days after the making thereof." Mrs. *Strode*'s leaſe expired at *Midſummer* 1740, the houſe was not burnt down till the *January* after 1740, and ſhe made an aſſignment of the policy to the plaintiffs the 23d of *February* after 1740. The queſtion is, whether the plaintiffs, the aſſignees of Mrs. *Strode*, are entitled to the 400 *l.* or to have the houſe built again; or whether the houſe being burnt down after Mrs. *Strode*'s property ceaſed in it, the Company are obliged to make good the loſs to her aſſignee of the policy. The Company made an order, ſubſequent in time to Mrs. *Strode*'s policy in 1738, " That,
" whereas policies expire upon the property of the inſured's
" ceaſing, if there is no application of the inſured to aſſign,
" or to have the loſs made up, then the perſon having the
" property may inſure the ſaid houſe in the ſaid office, not-
" withſtanding the term for which the houſe was originally
" inſured is expired." There was evidence read for the plaintiffs to ſhew that they tendered the aſſignment to the defendants, to enter in their books, but they refuſed to accept of it.

Lord Chancellor *Hardwicke*.—" During the progreſs of this cauſe, while the defendants ſeemed to depend chiefly upon the ſubſequent order, I was of opinion againſt them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three queſtions made in this cauſe. Firſt, whether this accident, which has happened, is ſuch a loſs, as obliges the defendants to make ſatisfaction to the plaintiffs. Secondly, whether upon the terms of the original policy, the office is obliged to do it. Thirdly, which is rather conſequential of the former, whether the plaintiffs are properly aſſignees of Mrs. *Strode* under this policy. If this matter reſted ſingly upon the policy itſelf, I ſhould not think it ſuch a loſs, as would oblige the defendants to make ſatisfaction. Under this policy, the ſtate of the caſe is, Mrs. *Strode* was only a leſſee, her time expired at *Midſummer* 1740, the houſe was burnt down in *January* after, *within the ſeven years*; the plaintiffs, the Sadlers Company, were ground landlords, and [455]

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entitled to the reverſion of the term: upon the 23d of *February*, ſeven months after the expiration of the term, and one month after the fire, the aſſignment was made, and in conſideration of five ſhillings only; ſo that it muſt be taken as a voluntary aſſignment, as it ſtands before me. It has been inſiſted, on the part of the defendants, that the plaintiffs are not entitled to recover, as ſtanding in the place of Mrs. *Strode*, becauſe ſhe had no loſs or damage, her intereſt ceaſing before the fire happened. And this introduces the ſecond and third queſtions. I am of opinion, it is neceſſary the party inſured ſhould have an intereſt or property at the time of inſuring, and at the time the fire happens. It has been ſaid for the plaintiffs, that it is in nature of a wager laid by the inſurance company, and that it does not ſignify to whom they pay, if loſt. Now theſe inſurances from fire have been introduced in later times, and therefore differ from inſurance of ſhips, becauſe there *intereſt or no intereſt* is almoſt conſtantly inſerted, and if not inſerted (*a*) you cannot recover, unleſs you prove a property. By the firſt clauſe in the deed of contribution in 1696, the year this ſociety, called the *Hand in Hand Office*, incorporated themſelves, the ſociety are to make ſatisfaction in caſe of any loſs by fire. To whom, or for what loſs, are they to make ſatisfaction? Why, to the perſon inſured, and for the loſs he may have ſuſtained; for it cannot properly be called inſuring the thing, for there is no poſſibility of doing it, and therefore muſt mean inſuring the perſon from damage. By the terms of the policy, the defendants might begin to build and repair within ſix days after the fire happens. It has been truly ſaid, this gives the ſociety an option to pay or rebuild, and ſhews moſt manifeſtly they meant to inſure upon the property of the inſured, becauſe nobody elſe can give them leave to lay even a brick; for another perſon might fancy a houſe of a different kind. Thus it ſtands upon the original agreement. The next queſtion will be, whether the ſubſequent order, made by the defendants in 1738, has made any alteration. I am of opinion it has not, for it was made only to explain a particular caſe in the policy: for it might have been a queſtion, whether Mrs.

(*a*) This caſe was decided in the year 1743, previous to the paſſing of the ſtatute of 19 *Geo.* 2. ch. 37.

Strode

Strode could have come, before the expiration of the term, to examine the books of the office, and therefore this order was made to give her ſuch a power. It has been ſtrongly objected that the ſociety could not make ſuch an order. I am very tender of ſaying, whether they can or not. Becauſe, on one hand, it might be hard to ſay, that as a ſociety they cannot make any order for the good of the ſociety: on the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the intereſt of the inſured. The aſſignment is not at all within the terms of this order, becauſe it is plain, it meant an aſſignment before the loſs happened. Now with regard to the loſs happening before the aſſignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the depoſit. It is plain ſhe thought ſo, for if ſhe had imagined ſhe had been entitled to 400*l.* would any friend have adviſed her to make a preſent of it to the plaintiff? The caſe of *Lynch* v. *Dalzell*, in the Houſe of Lords, ſhews how ſtrict this court and that houſe are, in the conſtruction of policies, to avoid frauds." The bill here muſt be diſmiſſed. Vide ſupra.

In the body of the policy, the company acknowledge the receipt of the premium at the time of making the inſurance: and by the printed propoſals of the different ſocieties, it is expreſsly ſtipulated, that no inſurance ſhall take place, till the premium be actually paid by the inſured, his, her, or their agent or agents. This premium or conſideration money is in all the offices at the rate of two ſhillings *per cent.* for any ſum not exceeding 1000*l.* and two ſhillings and ſixpence from 1000*l.* upwards. But this muſt be underſtood to mean the premium upon *common inſurances* only: for upon hazardous trades, and wooden buildings, &c. the premium is proportioned to the riſk. Beſide this, by a late act of parliament a duty of one ſhilling and ſixpence *per annum* is laid upon every hundred pounds of property inſured from fire. By a more modern ſtatute, an additional duty of ſixpence, for every ſum of one hundred pounds inſured, is impoſed, making in the whole two ſhillings *per cent.* The duty impoſed by the firſt act is not to extend to publick hoſpitals. 22 Geo. 3. c. 48. ſ. 1 & 2. 37 Geo. 3. c. 90. ſ. 19.

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Ante, ch. 19.

We have formerly ſeen, that whenever the riſk to be run was entire, there never was a return of premium, though the contract ſhould ceaſe and determine the next day after its commencement. This rule applies to inſurances againſt fire, which generally are made for one entire and connected portion of time, which cannot be ſevered: and therefore if the property inſured ſhould be deſtroyed by fire, ariſing from the act of a foreign enemy, the very day after the commencement of the policy, though the underwriter would be diſcharged, yet there can be no apportionment or return of premium.

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By a ſtatute paſſed in the reign of his preſent Majeſty, the ſtamp duties on policies for inſuring houſes, furniture, goods, wares, and merchandizes, or other property from loſs by fire, are repealed; and inſtead thereof it is provided, that for every policy of aſſurance from loſs by fire, where the ſum inſured ſhall not amount to 1000 *l.* the ſum of three ſhillings; and where the ſum inſured ſhall amount to 1000 *l.* or upwards, the ſum of ſix ſhillings ſhall be paid.

37 Geo. 3. c. 90. ſ. 23.

Sect. 24.

Vide ante, c. 9.

As the pureſt equity and good faith are eſſentially requiſite, as has been already ſhewn, to render the contract effectual when it relates to marine inſurances; ſo it need hardly be obſerved, that it is no leſs eſſential to the validity of the policy againſt fire: becauſe in the latter, as well as in the former, the inſurer, from the nature of the thing, is obliged, in a great meaſure, to rely upon the integrity and honeſty of the inſured, as to the repreſentation of the value and quantity of the property, which is the object of the inſurance.

APPEN-

APPENDIX, No. I.

Policy of Inſurance on Ship or Goods.

In the Name of God, *Amen.*

as well in own Name, as for and in the Name and Names of all and every other Perſon and Perſons to whom the ſame doth, may, or ſhall appertain, in Part or in All, doth make Aſſurance, and cauſe and them and every of them to be inſured, loſt, or not loſt, at and from

Upon any Kind of Goods and Merchandizes, and alſo upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat, and other Furniture, of and in the good Ship or Veſſel called the

whereof is Maſter, under God, for this preſent Voyage, or whoſoever elſe ſhall go for Maſter in the ſaid Ship, or by whatſoever other Name or Names the ſame Ship, or the Maſter thereof, is or ſhall be named or called; beginning the Adventure upon the ſaid Goods and Merchandizes from the loading thereof aboard the ſaid Ship, upon the ſaid Ship, &c.

and ſo ſhall continue and endure, during her Abode there, upon the ſaid Ship, &c. And farther, until the ſaid Ship, with all her Ordnance, Tackle, Apparel, &c. and Goods and Merchandizes whatſoever, ſhall be arrived at upon the ſaid Ship, &c. until ſhe hath moored at Anchor Twenty-four Hours in good Safety; and upon the Goods and Merchandizes, until the ſame be there diſcharged and ſafely landed. And it ſhall be lawful for the ſaid ſhip, &c. in this Voyage, to proceed and ſail to and touch and ſtay at any Ports and Places whatſoever without Prejudice to this Inſurance, the ſaid Ship, &c. Goods and Merchandizes, &c. for ſo much as concerns the Aſſureds by Agreement between the Aſſureds and Aſſurers in this Policy are and ſhall be valued at

Touching the Adventures and Perils which we the Aſſurers are contented to bear, and do take upon us in this Voyage,

Voyage, they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettiſons, Letters of Mart and Counter-mart, Surprizals, Takings at Sea, Arreſts, Reſtraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality ſoever; Barratry of the Maſter and Mariners, and of all other Perils, Loſſes and Misfortunes, that have or ſhall come to the Hurt, Detriment, or Damage, of the ſaid Goods and Merchandizes and Ship, &c. or any Part thereof. And in caſe of any Loſs or Misfortune, it ſhall be lawful to the Aſſureds, their Factors, Servants, and Aſſigns, to ſue, labour and travel for, in and about the Defence, Safeguard, and Recovery of the ſaid Goods and Merchandize and Ship, &c. or any Part thereof, without Prejudice to this Inſurance; to the Charges whereof we the Aſſurers will contribute each one according to the Rate and Quantity of his Sum herein aſſured. And it is agreed by us the Inſurers, that this Writing or Policy of Aſſurance ſhall be of as much Force and Effect as the ſureſt Writing or Policy of Aſſurance heretofore made in *Lombard-ſtreet*, or in the *Royal Exchange*, or elſewhere in *London*. And ſo we the Aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own Part, our Heirs, Executors, and Goods, to the Aſſured, their Executors, Adminiſtrators, and Aſſigns, for the true Performance of the Premiſes, confeſſing ourſelves paid the Conſideration due unto us for this Aſſurance by the Aſſured

at and after the Rate of

In Witneſs whereof we the Aſſurers have ſubſcribed our Names and Sums aſſured in *London*.

N. B. Corn, Fiſh, Salt, Fruit, Flour, and Seed, are warranted free from Average, unleſs general, or the Ship be ſtranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average, under Five Pounds *per Cent.* And all other Goods, alſo the Ship and Freight, are warranted free of Average under Three Pounds *per Cent.* unleſs general, or the Ship be ſtranded.

APPENDIX, No. II.

Form of a Reſpondentia Bond.

KNOW all Men by theſe Preſents, That held and firmly bound to in the Sum, or Penalty of of good and lawful Money of *Great Britain*, to be paid to the ſaid or to certain Attorney, Executors, Adminiſtrators, or Aſſigns; to which Payment, well and truly to be made Heirs, Executors, and Adminiſtrators, firmly by theſe Preſents, ſealed with Seal. Dated this Day of in the Year of the Reign of our Sovereign Lord by the Grace of God, of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith, and ſo forth, and in the Year of our Lord One thouſand ſeven hundred and The Condition of the above-written Obligation is ſuch, that whereas the above-named hath, on the Day of the Date above-written, lent unto the above-bound the Sum of upon the Merchandizes and Effects, to that Value laden, or to be laden, on board the good Ship or Veſſel called the of the Burthen of Tons or thereabouts, now in the River *Thames*, whereof is Commander. If the ſaid Ship or Veſſel do, and ſhall with all convenient Speed, proceed and ſail from and out of the ſaid River of *Thames*, on a Voyage to any Ports or Places in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere beyond the *Cape of Good Hope*, and from thence, do and ſhall ſail and return unto the ſaid River of *Thames*, at or before the End and Expiration of Thirty-ſix Calendar Months, to be accounted from the Day of the Date above-written, and that without Deviation, (the Dangers and Caſualties of the Seas excepted). And if the above-bound Heirs, Executors, or Adminiſtrators, do and ſhall, within Days next after the ſaid Ship, or Veſſel, ſhall be arrived in the ſaid River of *Thames*, from the ſaid Voyage, or at the End and Expiration of the ſaid Thirty-ſix Calendar Months, to be accounted as aforeſaid (which of the ſaid Times ſhall firſt and next happen) well and truly pay, or cauſe to be paid, unto the above-named Executors, Adminiſtrators, or Aſſigns, the Sum of of lawful Money of

of *Great Britain*, together with
of like Money, by the Calendar Month, and ſo proportionably for a greater or leſſer Time than a Calendar Month, for all ſuch Time, and ſo many Calendar Months, as ſhall be elapſed, and run out of the ſaid Thirty-ſix Calendar Months, over and above twenty Calendar Months, to be accounted from the Day of the Date above-written; or if in the ſaid Voyage, and within the ſaid Thirty-ſix Calendar Months, to be accounted as aforeſaid, an utter Loſs of the ſaid Ship, or Veſſel, by Fire, Enemies, Men of War, or any other Caſualties ſhall unavoidably happen; and the above-bound
Heirs, Executors, or Adminiſtrators, do and ſhall, within Six Months next after the Loſs, pay and ſatisfy to the ſaid Executors or Adminiſtrators, or Aſſigns, a juſt and proportional Average on all Goods and Effects which the ſaid
carried from *England* on board the ſaid ſhip or Veſſel, and on all other the Goods and Effects of the ſaid which ſhall acquire during the ſaid Voyage, and which ſhall not be unavoidably loſt: then the above-written Obligation to be void, and of no Effect; or elſe to ſtand in full Force and Virtue.

Sealed and delivered (being firſt duly ſtampt) in the Preſence of } *J. S.*

APPENDIX, No. III.

Form of a Policy of Inſurance upon a Life.

In the Name of God, *Amen.*

do make Aſſurance, and cauſe to be aſſured upon natural Life aged for and during the Term and Space of
Calendar Months, to commence this Day of in the Year of our Lord One thouſand ſeven hundred and fully to be complete and ended. And it is declared, that this Aſſurance is made to and for the Uſe, Benefit, and Security, of the ſaid Executors, Adminiſtrators, and Aſſigns, in caſe of the Death of the ſaid
within

within the Time aforeſaid, which the above Governor and Company do allow to be good and ſufficient Ground and Inducement for making this Aſſurance, and do agree that the Life of the ſaid is and ſhall be rated and valued at the Sum aſſured: The ſaid Governor and Company therefore, for and in Conſideration of *per Cent.* to them paid, do aſſure, aſſume, and promiſe, that the ſaid ſhall, by the Permiſſion of Almighty God, live, and continue in this natural Life, for and during the ſaid Term and Space of Calendar Months, to commence as aforeſaid; or in Default thereof, that is to ſay, in caſe the ſaid ſhall, in or during the ſaid Time, and before the full End and Expiration thereof, happen to die, or deceaſe out of this World by any Way or Means whatſoever, that then the aboveſaid Governor and Company will well and truly ſatisfy, content, and pay unto the ſaid Executors, Adminiſtrators, or Aſſigns, the Sum or Sums of Money by them aſſured, and are here under-written, hereby promiſing and binding themſelves and their Succeſſors to the Aſſured, Executors, Adminiſtrators, or Aſſigns, for the true Performance of the Premiſes, confeſſing themſelves paid the Conſideration due unto them for this Aſſurance by the Aſſured. *Provided* always, and it is hereby declared to be the true Intent and Meaning of this Aſſurance, and this Policy is accepted by the ſaid upon Condition that the ſame ſhall be utterly void and of no Effect, in caſe the ſaid ſhall exceed the *Age* of or ſhall voluntarily go to *Sea* or into the *Wars*, by Sea or Land, without Licence in Writing firſt had or obtained for ſo doing, any Thing in theſe Preſents to the contrary hereof in anywiſe notwithſtanding. In witneſs whereof the ſaid Governor and Company have cauſed their common Seal to be hereunto affixed, and the Sum or Sums by them aſſured to be here under-written, at their Office in *London*, this Day of in the Year of the Reign of our Sovereign Lord by the Grace of God, of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith, *&c.* and in the Year of our Lord One thouſand ſeven hundred and The ſaid Governor and Company are content with this Aſſurance for £.

APPENDIX, No. IV.

Form of a Policy of Inſurance againſt Fire.

BY the Corporation of the *Royal Exchange* Aſſurance of Houſes and Goods from Fire

This preſent Inſtrument or Policy of Aſſurance witneſſeth, That whereas agreed to pay into the Treaſury of the Corporation of the *Royal Exchange* Aſſurance, at their Office on the *Royal Exchange, London*, for the Aſſurance of

from Loſs or Damage by Fire. *Now know all Men by theſe Preſents*, That the capital Stock, Eſtate, and Securities of the ſaid Corporation ſhall be ſubject and liable to pay, make good, and ſatisfy unto the ſaid Aſſured Heirs, Executors, or Adminiſtrators, any Loſs or Damage which ſhall or may happen by Fire to the ſaid Goods aforeſaid (except ſuch Goods as Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Glaſs, China, and Earthen Wares, Writings, Books of Accounts, Notes, Bills, Bonds, Tallies, ready Money, Jewels, Plate, Pictures, Gun-powder, Hay, Straw, and Corn unthreſhed), within the Space of twelve Calendar Months from the Day of the Date of this Inſtrument or Policy of Aſſurance, not exceeding the Sum of

and ſhall ſo continue, remain, and be ſubject and liable, as aforeſaid, from Year to Year, to be computed from the Day of in every Year, for ſo long Time as the ſaid Aſſured ſhall well and truly pay, or cauſe to be paid, the Sum of into the Treaſury of the ſaid Corporation, on or before the Day of which ſhall be in each ſucceeding Year, and the ſaid Corporation ſhall agree thereto by accepting and receiving the ſame; which ſaid Loſs or Damage ſhall be paid in Money immediately after the ſame ſhall be ſettled and adjuſted, or otherwiſe, if the ſaid Loſs or Damage ſhall not be adjuſted, ſettled, and paid within ſixty Days after Notice thereof ſhall be given to the ſaid Corporation, by the ſaid Aſſured, that then the ſaid Corporation, their Officers, Workmen, or Aſſigns, ſhall, at the Charge of the ſaid Corporation, at the End and Expiration of the ſaid ſixty Days, provide and ſupply the ſaid Aſſured with the like Quantity of Goods of the ſame Sort and Kind, and of equal Value and Good-

neſs

neſs with thoſe burnt or damnified by Fire. *Provided always nevertheleſs*, and it is hereby declared to be the true Intent and Meaning of this Deed or Policy, That the ſaid Stock, Eſtate, and Securities of the ſaid Corporation ſhall not be ſubject or liable to pay or make good to the Aſſured any Loſs or Damage by Fire, which ſhall happen by any Invaſion, Foreign Enemy, or any military or uſurped Power whatſoever. *Provided alſo*, That this Deed or Policy ſhall not take place or be binding to the ſaid Corporation until the Premium for one Year is paid, or in caſe the ſaid Aſſured ſhall have already made, or ſhall hereafter make any other Aſſurance upon the Goods aforeſaid, unleſs the ſame ſhall be allowed of and ſpecified upon the Back of this Policy: Or if the ſaid at the Time when any ſuch Fire ſhall happen, ſhall be in the Poſſeſſion of, or let to any Perſon who ſhall uſe or exerciſe therein the Trade of a Sugar-baker, Apothecary, Chymiſt, Colour-man, Diſtiller, Bread or Biſcuit-baker, Ship or Tallow-chandler, Stable-keeper, Innholder, or Maltſter, or ſhall be made uſe of for the ſtowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine; but that in all or any of the ſaid Caſes theſe Preſents, and every Clauſe, Article, and Thing, herein contained, ſhall ceaſe, determine, and be utterly void and of none Effect, or otherwiſe ſhall remain in full Force and Virtue. In Witneſs whereof the ſaid Corporation have cauſed their common Seal to be hereunto affixed, the Day of in the Year of the Reign of our Sovereign Lord by the Grace of God, of *Great Britain*, *France*, and *Ireland*, King, Defender of the Faith, &c. and in the Year of our Lord One thouſand ſeven hundred

N. B. This Policy to be of no Force, if aſſigned, unleſs ſuch Aſſignment be allowed by an Entry thereof in the Books of the Company.

TABLE

TABLE

OF THE

PRINCIPAL MATTERS.

Abandonment.

BEFORE a perſon inſured can demand from the underwriter a recompence for a total loſs, he muſt abandon to him whatever claims he may have to the property inſured. *Page* 82, 143

The time, within which ſuch an abandonment muſt be made, was not fixed in *England* till lately by any poſitive regulation or deciſion. 82, 172

Abandonment is as ancient as the contract of inſurance itſelf. 143

When an abandonment is made, it muſt be total, and not partial. 144

The inſured may in all caſes chuſe not to abandon; but he cannot at his pleaſure abandon, and thereby turn a partial into a total loſs. *ibid.*

The inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value; if the voyage be abſolutely loſt or not worth purſuing; if farther expence be neceſſary; or if the inſurer will not engage at all events to bear that expence, though it ſhould exceed the value, or fail of ſucceſs. 145, 152, 159

But he cannot abandon, unleſs at ſome period or other of the voyage, there has been a total loſs; and if neither the thing inſured, nor the voyage be loſt, and the damage does not amount to a moiety of the value, he ſhall not be allowed to abandon 146, 164

Abandonment muſt be made, though the property be converted into money. 172

The doctrine of abandonment illuſtrated by the caſe of *Goſs* v. *Withers*. 148

And alſo by the caſe of *Milles* v. *Fletcher*. 152

The right to abandon muſt depend on the nature of the caſe at the time of the action brought, or at the time of the offer to abandon; and therefore if, at the time advice is received of the loſs, it appears that the peril is over and the thing in ſafety, the inſured has no right to abandon. *P.* 146, 159

Thus in a caſe where there was a capture and recapture, and it was ſtated that, at the time of the offer to abandon, the ſhip was ſafe in port; and had ſuſtained no damage, the court held that the inſured had no right to abandon. 157

But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund; but the inſurer ſhall ſtand in his place for the benefit of ſalvage. 164

A ſhip was inſured from *Wyburg* to *Lynn*, at which place ſhe arrived: the jury found that the ſhip was not worth repairing: but the damage ſuſtained in the voyage inſured did not exceed 48 *l. per cent.* By the court, the jury have precluded us from ſaying this is a total loſs; and where neither the thing inſured nor the voyage is loſt, the inſured cannot abandon. *ibid.*

Inſurance on ſhip, cargo and freight, at and from *Tortola* to *London*, warranted free of particular average. On the 1ſt of *Auguſt* the whole fleet got under way, but not being able to get clear of the iſlands, they anchored that night, and next day got clear of the iſlands. About 10 o'clock on the 2d of *Auguſt* ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain, and make water ſo faſt that the crew were obliged to work both pumps: on the 3d the captain made a ſignal of

distreſs, and returned to *Tortola*. A ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo; that ſhe could not be repaired in any of the *Engliſh Weſt India Iſlands*; many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral of the caſks broke and in bad order. This was held to be a total loſs, the voyage being entirely defeated. *Page* 168

Election to abandon, when to be made. 172

Notice of abandonment neceſſary, though the ſhip and cargo had been ſold, when notice of the loſs was received. 172 *a*, note (*a*)

Action.

An action on the caſe lies againſt an agent for not having inſured agreeably to the orders of his principal. 303 note (*a*)

The only difference between this action, and that on the policy againſt the underwriters, conſiſts in form: for the plaintiff is entitled in this action to recover the preciſe ſum he ordered to be inſured; and the defendant has every benefit of which the underwriter could have taken advantage, ſuch as fraud, deviation, non-compliance with warranty, &c. 303, note (*a*)

Such an order to inſure muſt be obeyed in the three following inſtances, otherwiſe this action will lie. Firſt, where a merchant abroad has effects in the hands of his correſpondent here. Second, where the merchant abroad has been *uſed* to ſend orders for inſurance, and the one here to comply with them. Thirdly, if the merchant abroad ſend bills of lading, and engraft on them an order to inſure, as the term of their acceptance. 304, note

If a merchant here accept an order for inſurance, and limit the broker to too ſmall a premium, by which means no inſurance can be procured, this action lies. 304, note

An action of *indebitatus aſſumpſit*, for money had and received for the plaintiff's uſe, is the proper form of action, in order to recover the premium. 368, 398

In order to recover upon a policy againſt either of the inſurance companies, the action muſt be *debt* or *covenant*, and they may plead generally. *Page* 396, 397

When money has been paid by miſtake to the inſured, it may be recovered back in an action for money had and received to the plaintiff's uſe. 398

In order to recover againſt a private underwriter upon the policy, the form of action is a ſpecial *indebitatus aſſumpſit*, founded upon the expreſs contract. 397

The action may be brought in the name of the broker effecting the policy. 403

Within fifteen days after action brought, plaintiff, after requeſt in writing, muſt declare the amount of all inſurances on the ſame ſhip. *ibid.*

See title *Declaration*.

Adjuſtment.

When the quantity of damage ſuſtained in the courſe of the voyage is known, and the amount which each inſurer is to pay is ſettled, it is uſual for the underwriter to indorſe on the policy, "adjuſted this loſs at ſo much *per cent.*" This is an adjuſtment. 117

After an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances. It is to be conſidered as a note of hand. 117

This rule has been ſince relaxed and explained 118

After judgment by default upon a related policy, the plaintiff's title to recover is confeſſed, and the amount of the damage is fixed by the policy. *ibid.*

If a loſs be total at the time of the adjuſtment, and the inſurer pay for a total loſs, the inſured is not obliged to refund, if it ſhould afterwards turn out to be but partial; but the inſurer will ſtand in the place of the inſured. *ibid.*

A box of bullion was wholly loſt, the loſs adjuſted and paid, and an agreement was entered into, at the time of adjuſtment, that the inſured would refund

refund to the insurer whatever he should recover, in such proportion as the sum insured bore to the whole interest. The bullion was afterwards fished up, and the insured paid into court the insurer's proportion, after deducting salvage. The court held this to be right. *Page* 118

Admiralty.

The sentence of a *French* consul resident in a neutral country upon a ship brought in there, is void by the law of nations. 353

The sentence of a foreign Court of Admiralty is conclusive, as to every thing contained in it; but where the cause of condemnation of a ship does not appear to be on the specifick ground material to the point in issue, parole evidence must be allowed to explain it. 353 *a*

Thus it is not conclusive to shew that a ship was not neutral, unless it appeared that the condemnation went on that ground. *ibid.*

A sentence of such a court cannot be controverted collaterally in a civil suit. 356

If it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged. 359, 361, 362

Even where no special ground of condemnation is stated, but the ship is condemned as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral. 362

If a foreign Court condemn a neutral as *enemy's property* for not having a list of the crew required by a *French* ordinance, and *adjudge it to be requisite within the construction of the treaty* between the countries, such sentence is conclusive. 363

Sailing without a passport as required by treaties between *America* and other states is a non-compliance with a warranty of being an *American*. 363, note (*a*)

But if the ground of decision appear to be not on the ground of not being neutral, but on a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer. *Page* 363 *a*

If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the Court here will not discharge the insurers, by declaring that the insured has forfeited his neutrality. 364

A ship warranted neutral forfeits her neutrality, if a Court of Admiralty condemn her on that ground for refusing to be searched. 365

Condemnation upon survey not evidence of the facts stated in it. 406

Agent.

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case, the contract is founded in deception, and the policy is consequently void. 208

This rule prevails, even though the act cannot be at all traced to the owner of the property insured. 209

The plaintiff's agent shipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an insurance done. The letter was dated the 16th of *September*, and it contained this sentence, "I this day shipped on board the *Joseph*, *which sailed immediately*, a cargo of oats," &c. This letter was not, however, sent till one o'clock on the 17th. The case states, that about six o'clock in the evening of the 16th, *Thomas* (the agent) heard a report that the ship was on shore; and at six o'clock in the morning of the 17th *he knew* the ship was lost. The policy was held void on account of the fraud in *Thomas*. 210

Agent not inſuring according to directions is liable to an action. *Page* 303

Alien. See *Enemy.*

Alteration.

A policy cannot be altered after it is ſigned 1

Unleſs there be ſome written document to ſhew that the intention of the parties was miſtaken; or unleſs it be altered by conſent of the parties. 3

Amalfitan Code.

Some account of it. Introd. p. xxvii.

Apportionment.

See Return of Premium.

Arbitration.

Effect of Clauſe of in a Policy. 396

Arrival.

See titles, Riſk, Continuance of Riſk, and Conſtruction of Policy.

Aſſignment.

Policies of inſurance againſt fire are not aſſignable without conſent of the office. 449

But in marine inſurances, the policy may be transferred. 449, note (*a*)

Aſſumpſit. See *Action.*

Aſſurance. See *Inſurance.*

Average, General.

When goods are thrown overboard in a ſtorm to lighten the ſhip, for the general ſafety of the ſhip and cargo, the owners of the ſhip and of the goods ſaved, are to contribute for the relief of thoſe whoſe goods are ejected: this contribution is called a general average. 99, 121

Average and contribution in commercial writers, are ſynonimous terms 121

The doctrine of average was introduced by the *Rhodians.* *ibid.*

Three things, it is ſaid, muſt concur to make the act of throwing goods overboard legal: 1ſt, That what is ſo condemned to deſtruction, be in conſequence of a deliberate and voluntary conſultation between the maſter and men. 2d, That the ſhip be in diſtreſs, and that ſacrificing a part be neceſſary for the preſervation of the reſt. 3d, That the ſaving of the ſhip and cargo be owing to the means uſed with that view. But the 2d ſeems to be the only material one. *Page* 122

To an action of treſpaſs for throwing goods overboard, a man pleaded that he did it *navis levandæ cauſâ*; and that otherwiſe the paſſengers muſt have periſhed. The plea was held good. *ibid.*

If the *jettiſon* (that is, the throwing over of the goods) do not ſave the ſhip, but ſhe periſh in the ſtorm, there ſhall be no contribution of ſuch goods as may happen to be ſaved. 123

But if the ſhip, being once preſerved by ſuch means, be afterwards loſt, the property ſaved from the ſecond accident ſhall contribute to the loſs occaſioned by the former jettiſon. *ibid.*

The various accidents and charges, which will entitle the ſuffering party to call for a contribution, enumerated. *ibid.*

If goods be put on board a lighter, to enable the ſhip to ſail into a harbour, and the lighter periſh, the owners of the ſhip and the remaining cargo are to contribute. 124

But if the ſhip be loſt, and the lighter ſaved, the owners of the goods preſerved are not to contribute. *ibid.*

Not only the value of the goods thrown overboard muſt be conſidered in a general average; but alſo the value of ſuch as receive any damage by wet, &c. from the jettiſon of the reſt. *ibid.*

If a ſhip be taken and carried into port, and the crew remain to take care of and reclaim her, the charges of reclaiming and the wages and expences of the ſhip's company during her arreſt, and from the time of her capture, it is ſaid, ſhall be brought into a general average. 124, *ibid.*

Not

Not ſo for ſailors' wages and proviſions, during performance of a quarantine. *Page* 125

Quære. Whether extraordinary wages and victuals, during a detention by a foreign prince, not at war, be a ſubject of average? 125, 126

It ſeems that wages, &c. during a detention to repair are. *Qu. ibid.*

So where a ſhip is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading, and the wages and proviſions of the workmen hired for the repairs, are a general average. 126

Diamonds and jewels, when a part of the cargo, muſt contribute according to their value. 126, 129

Ship proviſions, the perſons of the paſſengers, wearing apparel, and ſuch jewels as merely belong to the perſon, do not contribute. 127

Nor do bottomry or reſpondentia bonds in *England*. 127, 422

Nor the wages of the ſailors. 127

In order to fix a right ſum, on which the average may be computed, we ſhould conſider what the whole ſhip, freight, and cargo, would have produced neat, if no jettiſon had been made; and then the ſhip, freight, and cargo are to bear an equal and proportional part of the loſs. 127

The goods thrown overboard are to be eſtimated at the price for which the goods ſaved were ſold, freight and all other charges being firſt deducted. 128

The contribution is, in general, not made till the ſhip's arrival at the port of diſcharge. 129

The inſurer by his contract engages to indemnify the inſured againſt all loſſes ariſing from a general average. *ibid.*

Contribution muſt be enforced in a Court of Equity. 130 *a*

Average Loſs, vide *Partial Loſſes*.

Bankruptcy.

IF the original inſurer become a bankrupt, it ſhall be lawful for him or his aſſigns to make a re-aſſurance to the amount before by him inſured, provided it be expreſſed in the policy to be a re-aſſurance. *Page* 277

The act was held to prohibit re-aſſurances on foreign ſhips, except in the caſe of bankruptcy or death of the firſt aſſurer. 279

If the inſurer, after the writing of the policy and before a loſs happen, ſhould become a bankrupt, the inſured may prove his debt under the commiſſion, as if the loſs had happened previous to the bankruptcy of the underwriter. 278, note (*a*)

This ſtatute has been held to extend to inſurances upon lives. 435

If the borrower on bottomry becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commiſſion, as if the event had actually happened. 427

Barratry.

It is barratry in the maſter to ſmuggle on his own account 32

The derivation of the word "*barratry*," is very doubtful. 83

Any act of the maſter, or mariners, of a criminal nature, or which is groſsly negligent, tending to their own benefit, to the prejudice of the *owners of the ſhip*, and without their conſent or privity, is barratry. 83, 84

There muſt be ſomething fraudulent to conſtitute barratry. 91 *a*

It is not neceſſary, in order to make the inſurers liable, that the loſs ſhould happen *in the very act of barratry*; for the moment the ſhip is carried from its proper track, with an evil intent, barratry is committed. 84, 90

But the loſs in conſequence of the act of barratry muſt happen *during the voyage inſured*, and within the time limited in the policy. 31, 84

If the act of the captain be done for the benefit of his owners, and not with a view to his own intereſt, it is not barratry. *ibid.*

If the owner of the ſhip freight it out for a ſpecifick voyage, the freighter is to be conſidered as owner *pro hac vice*;

vice; and if the maſter commit a criminal act, without his privity, though with the knowledge of the original owner, it is barratry. *Page* 84, 89
The inſurers by expreſs words, undertake generally for the barratry of the maſter and mariners. 85
If a declaration ſtate a ſhip to have been loſt by the *fraud and negligence* of the maſter, that is a ſufficient averment of a loſs by *barratry*. *ibid.*
But where a ſhip ſailed a different courſe from that firſt intended, which alteration was publickly notified before the ſhip ſailed, and where the maſter was to have no benefit by the change, it was held not to be barratry. 86
So if a ſhip take a prize, and, inſtead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, againſt the orders of his owners, the captain is juſtified by neceſſity; and it is not barratry, becauſe not done to defraud the owners. 87
A ſhip was inſured from *London* to *Seville*; ſhe was let to freight for the voyage; ſhe ſailed from *London* to the *Downs*, from thence ſhe ſailed to *Guernſey*, *which was out of the courſe of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ſhip, *but not of the freighter for that voyage*. This was held to be barratry. 88
A breach of an embargo is an act of barratry in the maſter. *Qy.* 91
If the captain cruize for, and take a prize, contrary to his owner's inſtructions, it is barratry. 91 *a*
An act of the captain, *with the knowledge of the owners of the ſhip*, though without the privity of the owner of the goods, who happened to be the perſon inſured, is not barratry. 92
If the maſter of the ſhip be alſo the owner, he cannot be guilty of barratry. 94
The *onus* of proving the captain to be owner, lies upon the underwriter. *ibid.*
The ſame rule prevails, if he commit an act, which would be barratry in any other maſter, even though he has mortgaged the ſhip. *ibid.*
If the words, "*in any lawful trade*" be inſerted, ſtill the underwriters are anſwerable, if the captain commit barratry by ſmuggling on his own account. *Page* 95
If any captain, or mariner, belonging to any ſhip, ſhall wilfully burn or deſtroy her, to the prejudice of any merchant loading goods thereon, *or of any perſon underwriting any policy thereon*, or to the prejudice of the owner of the ſhip, he ſhall ſuffer death as a felon, without benefit of clergy. 96, 97
If the offence be committed within the body of a county, the offender ſhall be tried in a court of common law; if upon the high ſeas, it ſhall be tried according to the directions of the 28th *Henry* 8. ch. 15. 97
It ſhould ſeem a lender on bottomry would not be liable for an accident ariſing from the barratry of the maſter. 421

Bill of Lading. See *Lading.*

Bottomry and Reſpondentia.

Bottomry is a contract, by which the owner of a ſhip borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip as a ſecurity for the repayment. 410
If the ſhip be loſt, the lender alſo loſes his whole money; but if not, he ſhall receive his principal and the ſtipulated intereſt, however it exceed the legal rate. *ibid.*
When the ſhip and tackle are brought home, they are liable as well as the perſon of the borrower for the money lent. *ibid.*
When the loan is not made upon the veſſel, but upon the goods, then the borrower only is *perſonally* bound to anſwer the contract, who is ſaid to take up money at *reſpondentia*. *ibid.*
In this conſiſts the chief difference between bottomry and *reſpondentia*; in moſt other reſpects they are the ſame. *ibid.*
There is a third kind of contract upon the mere hazard of the voyage, with-

out any intereſt in ſhip or goods. *Page* 411
This is prohibited as to *Eaſt India* voyages. *ibid.*
The borrower on reſpondentia can only inſure the ſurplus value of the goods over and above the money borrowed. 410
The lender alone can make inſurance on the money lent. 411
All contracts made by any of his Majeſty's ſubjects by way of bottomry on the ſhips of *foreigners* trading to the *Eaſt Indies* are null and void. *ibid.*
Q. Whether an *American* ſhip, ſince the declaration of American independency, be a *foreign* ſhip within the ſtatute? 412
Bottomry aroſe from the power given to the maſter of hypothecating the ſhip and goods for neceſſaries in a foreign country. 413
But the ſhip muſt be *abroad*, and in a ſtate of *neceſſity* to juſtify ſuch an act of the maſter. *ibid.*
This ſpecies of contract was known to the *Rhodians*. 415
The principle, upon which bottomry is allowed, is, that the lender runs the riſk of loſing his principal and intereſt; and therefore it is not uſury to take more than the legal rate. 416
If a contract were made, by colour of bottomry, in order to evade the ſtatute, it would be uſurious. 419
The legality of the contract defended. *ibid.*
But if the riſk be not run, the lender is not entitled to the extraordinary premium. *ibid.*
The riſks, to which the lender expoſes himſelf, are generally mentioned in the condition of the bond; and are nearly the ſame againſt which the underwriter in a policy of inſurance undertakes to indemnify. 421
But the lender is not liable for accidents ariſing from the miſconduct of the borrower. *ibid.*
Piracy is one of the riſks which the lender on bottomry runs. *ibid.*
If a loſs by *capture* happen, he cannot recover againſt the borrower. *ibid.*
But this does not mean a mere temporary taking; but it muſt be ſuch as to occaſion a total loſs. *Page* 421
Therefore where a ſhip was taken and detained for a ſhort time, and yet arrived at the port of deſtination within the time limited, it was held that the bond was not forfeited. *ibid.*
If the ſhip be loſt by a wilful deviation from the track of the voyage, the event has not happened upon which the borrower was to be diſcharged from his obligation. 424
If the borrower becomes bankrupt after the loan of the money, and before the event happens, which entitles the lender to repayment, the lender may prove his debt under the commiſſion, as if the event had actually happened. 427
Bottomry and reſpondentia may be inſured, provided it be ſpecified to be ſuch intereſt in the policy. 9, 428
Unleſs the uſage of trade ſanctions a different proceeding. 11
When a perſon inſures a bottomry intereſt, and recovers upon the bond, he cannot alſo recover upon the policy. 428
A lender on bottomry or at reſpondentia is neither entitled to benefit of ſalvage, nor liable to average by the law of *England*. 127, 422
It is otherwiſe in *France*, and in *Denmark*. 423
But if a man inſure reſpondentia intereſt on a *Daniſh* ſhip, and be obliged to contribute to an average loſs by the laws of *Denmark*, *Engliſh* underwriters are bound to indemnify. *ibid.*
Q. Whether money may be lent on bottomry, or at reſpondentia to an enemy in time of war? 426

Broker.

The broker, by the cuſtom, is liable to be ſued by the inſurer for premiums, notwithſtanding the acknowledgement by the inſurer, in the policy, that he has received them. 26
The broker may maintain an action againſt the inſured, for premiums paid on his account. 25, 27.

The broker has a lien upon all the policies in his hands for his general balance, *Page* 403, note (*b*)

See *Agent.*

Capture.

AS between the insurer and insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value. 66, 77

If either before or after condemnation the owner retake her, and have paid salvage, the insurer must pay the loss so actually sustained. 66

If the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. *ibid.*

A capture having been illegal, but the charges and delay being great, the insured made a compromise, *bonâ fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise. 67

Before the statute of 19 *Geo.* 2. ch. 37. which abolished wager policies, the recapture had a considerable effect upon the contract of insurance. 69

But now the contract is not at all altered between an insurer and an insured. *ibid.*

The opinions of foreign writers with respect to capture and recapture stated 70

By the maring law of *England*, as practised in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. 71, 138

But now by statute this right of the original owner, in case of a recapture, is preserved to him for ever, upon payment of stated salvage to the recaptors. 72, 139

Before the stat. of 19 *Geo.* 2. ch. 37. several cases were determined upon the question of recapture in the *English* courts; but the same question can never again arise between an insurer and insured. *Page* 73 to 77

If the ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. 77

Or, if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution. *ibid.*

See *Bottomry.*

Changing the Ship.

It being necessary, except in some special cases, to insert the name of the ship on which the risk is to be run in the policy; it follows as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences; in which case there would be no contract at all; nor during the voyage remove the property insured from one ship to another, without consent of the insurer, or without an unavoidable necessity. 20, 290

If he do, the implied condition is broken, and he cannot, in case of loss, recover against the underwriter. *ibid.*

The ship on which the risk is to be run, forms a material part of the contract. *ibid.*

The opinions of *English* mercantile writers, and of foreign authors stated. 290, 291

Expressly held in *England* that the insured, except in cases of real necessity, have no right to change the bottom of the ship; for when an insurance is made on a specifick ship, and the insured, without the consent of the underwriter, changes the ship, he has not kept his part of the contract. 293

Cloaths.

The master's cloaths are not included under a general insurance *on goods.* 21

Commencement of the Risk.

On the goods it is usually *from the loading*; on the ship, from the *beginning to load.* *Page* 23

On a policy "at and from *Bengal* to *England*," the risk commences *from the first arrival* at *Bengal.* 38

So at and from *Jamaica* to *London.* 38, 39

Compass (Mariner's.)

Invented by a native of *Amalfi*; and it contributed greatly to the revival of commerce. Introd. xxv.

Coin.

Whether insurable as *goods.* 22

Commission.

Whether commissions of a consignee of the cargo are insurable. 268, note (*a*)

Concealment, see *Fraud.*

Condemnation, see *Admiralty.*

Consent.

A policy may be altered by consent, even after it is signed. 3

Consolidation Rule.

For the history of the consolidation rule in insurance causes, see the Introduction, page xlix.

Construction of the Policy.

A policy must always be construed as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. 30

As policies are to be liberally construed, whatever is done by the master in the usual course, for good reasons, though a loss happen thereon, the insurer is liable. 30

No rule has been more frequently followed in questions of construction, than *the usage of trade*, with respect to the voyage insured, *ibid.*

A policy on a ship generally from *A.* to *B.* was construed to mean till the ship was *unloaded.* *Page* 30, 31

But if it contain the usual words "*till moored twenty four hours in safety*;" the insurers shall be answerable for no loss that does not happen before the expiration of the time. *ibid.*

Even though the loss was occasioned by an act committed during the voyage insured. *ibid.*

Thus where the master of the ship, during the voyage insured, committed an act of barratry by smuggling on his own account; the insurer was held not to be liable, because the ship was not seized till near a month after her arrival at the port of destination. *ibid.*

If a ship be insured for six months, and three days before the expiration of the time receive her death's wound, but by pumping is kept afloat till three days after the time, the insurer is discharged. 53

The loss must happen during the continuance of the voyage, or within 24 hours after her mooring at the port of destination. 34

Under a policy containing those words, the underwriters were held liable for a subsequent loss; because the captain the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine; and therefore the ship could not be said to have moored 24 hours *in safety*, although she did not go back for some days. 35

In a policy upon *freight*, if an accident prevent the ship from sailing, the insured cannot recover the *freight*, which he *would have earned*, if she had completed her voyage. *ibid.*

But if the policy be a *valued* policy, and part of the cargo be on board when such accident happens, the insured may recover to the whole amount. 136

If a ship, from stress of weather, is in a decayed condition, and goes to the nearest place to refit, it is to be considered in the same light, as if she had been repaired at the very place from which the voyage was to commence, and

and no deviation from the terms of the policy. *Page* 37

When a ſhip is inſured, "at and from *Bengal* to *London*," *the firſt arrival at Bengal* is intended to be the commencement of the riſk. 38

When an inſurance is "*at and from*," the ſhip is protected during her preparation for the voyage; but if all thoughts of the voyage be laid aſide, the inſurer is diſcharged. *ibid.*

Where there was an inſurance on the outward and homeward bound voyage, and the latter ran "*at and from Jamaica to London*;" it was held, that the homeward riſk began when the ſhip moored at any part of the iſland, and that there the outward riſk ended, and did not continue till ſhe came to the laſt port of delivery. *ibid.*

This caſe confirmed as to a policy *on the ſhip*, but the outward riſk *on goods*, continues till they are landed. 39

The two laſt caſes further confirmed in the caſe of *Leigh* v. *Mather*. 39

In conſtruing policies, the *ſtrictum jus*, or *apex juris*, is not to be the rule, but a liberal conſtruction is to be adopted, and the uſage of the trade called in to explain any doubts. 40

Thus in an inſurance on goods from *Malaga* to *Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and reſhipped in one or more *Britiſh* ſhip or ſhips, and it appearing in evidence that there was no *Britiſh* ſhip at *Gibraltar*, but the goods had been unloaded and put into a *ſtore ſhip*, (which was always conſidered as a warehouſe), the inſurers were held to be liable for the loſs of theſe goods in the ſtore ſhip 39, 40

A ſhip was inſured from *London* to any place beyond the *Cape of Good Hope*. The ſhip arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the ſails, &c. were taken out, and lodged in a *bank ſaul*, on an iſland in the river, (which was proved to be *uſual*, and beneficial to all concerned), the underwriter was held liable for the loſs of the ſails by fire, while in this *bank ſaul*. 41

The inſurer, at the time of underwriting, has under his conſideration the nature of the voyage, and the uſual manner of doing it. *Page* 42

What is uſually done by ſuch a ſhip, with ſuch a cargo, in ſuch a voyage, is underſtood to be referred to by every policy. *ibid.*

If a ſhip be driven a mile on ſhore by a hurricane, or be burnt in a dry dock, while repairing, the inſurer is liable. 43

The goods on board the ſhips, the *Hope* and the *Anne*, were inſured at and from *Dartmouth* to *Waterford*, and from thence to the port or ports of diſcharge, on the coaſt of *Labrador*, with leave to touch at *Newfoundland*, *till the goods ſhould be ſafely diſcharged and landed*. From the time of their arrival, the crew was chiefly employed in fiſhing, and took out their cargo only at leiſure times (which was fully proved to be the uſage), and the ſhips were taken by a privateer, before they were unloaded. The court held that the inſurers were liable; for that according to the uſage there was no delay. 44

When a man inſures one ſpecies of property, he cannot recover damage occaſioned by the loſs of a ſpecies of property different from that named in the policy. 52

Under a policy *upon the ſhip*, or *upon the goods*, the inſured cannot recover *extraordinary wages* paid to the ſeamen, or *proviſions* expended, during a detention to repair, or a detention by an embargo. 52, 53

Nor is the underwriter *on goods* liable for *the freight* paid by the owner of the goods to the proprietors of the ſhip, where the goods were partially loſt. 53, 54

In the conſtruction of policies, the loſs muſt be *a direct and immediate conſequence* of the peril inſured, and not a remote one, in order to entitle the inſured to recover. 56

This rule illuſtrated by a caſe of inſurance upon negroes. 56

In the conſtruction of a policy upon time, the ſame liberality prevails as in other caſes; and an attention to the

the meaning of the contracting parties has always been paid. *Page* 58

In an insurance at and from *Liverpool* to *Antigua*, *with liberty to cruise six weeks*; it was held, that this meant a connected portion of time, and not a desultory cruising for six weeks *at any time*. *ibid.*

Of the Construction of East India Policies, see *East India Voyages*.

Of the Construction of Losses by Perils of the Sea, see *Perils of the Sea*.

Of the Construction of Losses by Capture, see *Capture*.

Of the Construction of Losses by Detention, see *Detention*.

Of the Construction of Losses by Barratry, see *Barratry*.

Consular Sentences, see *Admiralty*.

Continuance of the Risk.

On the ship till her arrival at the port of destination, and till she has been moored 24 hours in good safety for the purpose of unloading. 23, 39

On the goods till they are safely landed at the port of destination; which includes the carriage in the ship's boat to the shore, but not in the boat of the owner of the goods. 23

If a policy be general on a ship from *A.* to *B.* the underwriter has been held answerable till the ship is unloaded. 30, 31

But if it contain the usual words "till moored 24 hours in safety;" the insurer is liable for no loss that does not happen before the expiration of that time. *ibid.*

Even though it be occasioned by an act done during the voyage insured. *ibid.*

If the master, during the voyage, commit an act of barratry by smuggling, and the ship be not seized till near a month after her arrival at the port of destination, the insurer is discharged. *ibid.*

If a ship be insured for six months, and three days before the expiration of that time receive her death's wound, but by pumping is kept afloat till three days after, the insurer is not liable. *Page* 33

But the ship cannot be said to have moored 24 hours in safety, when the very day, on which she arrives at her moorings, the Captain is served with an order to return to perform quarantine, although he does not obey for some days; and therefore the insurer is liable for a subsequent loss. 35

So if embargo laid on, and afterwards detained as prize. 35 *a*

Contraband, see *Prohibited Goods*.

Contribution, see *Average, General*.

Convoy.

If the insured warrant that the vessel shall depart with convoy, and she do not; the policy is defeated. 338

A convoy means a naval force, under the command of that person whom government may happen to appoint. 338, 341, 349

And this, whether government pleases to appoint a relay of convoy from place to place, or a convoy to a given latitude and no farther. 349

So also what is a convoy is governed by usage. 349 *a*

Where a ship put herself under the direction of a man of war till she should join the convoy, which had left the usual place of rendezvous before she arrived there, it was held not to be a departure with convoy, although she in fact joined and was lost in a storm. 339

Aliter, if the single ship be a part of the convoy. 342

Q. Whether sailing orders from the commander in chief to the particular ships are necessary to constitute a convoy? 341, 342

This seems now to be settled in the affirmative. 342 *a*

A convoy appointed by the admiral, commanding in chief upon a station abroad,

abroad, is a convoy appointed by government. *Page* 343
A ſailing with convoy from the uſual place of rendezvous, as *Spithead* for the port of *London*, is a *departure* with convoy, within the meaning of ſuch a warranty. 343, 344
Although the words uſed, generally are "to depart," or to "ſail with convoy;" yet it extends to ſail with convoy throughout the voyage. 345
But an unforeſeen ſeparation from convoy is an accident, to which the underwriter is liable. 347
So held where a ſhip was ſeparated from her convoy by ſtorm, and by ſtorm prevented from rejoining it, and was loſt. 348
Even where the ſhip has been prevented by tempeſtuous weather from joining the convoy, at leaſt ſo as to receive the orders of the commodore, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy. 348
Otherwiſe if the not joining be owing to the negligence and delay of the captain. 349
Ships belonging to *Great Britain* muſt now ſail with convoy, except in particular caſes. 349 *c*

Corn.

Is a general expreſſion in the memorandum at the foot of the policy, and has been held to include *peas*, *beans*, and *malt*. 112

Court.

The proper court for the trial of queſtions relative to policies of inſurance is a court of common law. 393
Courts of equity have no juriſdiction over ſuch queſtions. *ibid.*
If indeed the truſtee in a policy of inſurance actually refuſe his name to the *ceſtui que truſt* in an action at law, that may be a ground of application to a court of equity. 395
So alſo an application may be made to a court of equity for a commiſſion to examine witneſſes reſiding abroad. *ibid.*
It is alſo allowable, where fraud is ſuſpected, to apply to equity, in order to procure a diſcloſure of circumſtances upon the oath of the inſured. *Page* 396
But in all other caſes, a court of common law is the proper forum. *ibid.*
Even if the parties, by a clauſe in the policy, ſhould agree to refer any diſpute to arbitration, that will not ouſt the court of common law of its juriſdiction, unleſs a reference is in fact made, or is depending. 396

Court of Policies of Inſurance.

The hiſtory of its origin and decline. Introd. xlv

Cruiſe.

A liberty to cruiſe ſix weeks meant to give a permiſſion to cruiſe for *ſix ſucceſſive weeks*, and not a deſultory cruiſing for forty-two days at any time. 58

Cruſades.

They contributed to the revival of commerce. Introd. xxiv.

Date.

THE day, month, and year, on which the policy was executed, muſt be inſerted. 27

Declaration.

In order to entitle the inſured to recover expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy. 141
Thus, in a declaration on a policy on goods, it ſtated, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of ſalvage. 141, 409
A declaration on a policy of inſurance muſt ſet out the policy, and aver that it was ſigned by the defendant; and that, in conſideration of the premium,

mium, he undertook to indemnify the inſured. *Page* 398
The declaration muſt then ſtate the intereſt of the inſured. *ibid.*
It ſhould next ſhew the loſs to have happened by one of the perils mentioned in the policy; but it muſt ſtate it according to the truth. *ibid.*
To aver that the loſs happened by the *fraud and negligence of the maſter* is a ſufficient averment of *barratry*. 399
In a declaration for a *total*, the inſured may recover for a partial loſs. *ibid.*
Though the plaintiff appear in proof to have a larger intereſt than is averred in the declaration, yet he is entitled to recover. 402
The general iſſue, *non aſſumpſit* is the uſual plea, except in the caſe of the corporations, to a declaration upon a policy. 397, 404
The declaration need not ſtate the clauſe in the policy to refer diſputes to arbitration. 396

Deſtination.

Deſtination of the ſhip muſt be ſtated in the policy. 22

Detention.

The underwriter, by expreſs words, undertakes to indemnify againſt all damages ariſing from the detention of kings, princes, or *people* 78
People means the governing power of the country. *ibid.*
A detention is ſaid to be an arreſt or embargo in time of war or peace, laid on by the publick authority of a ſtate. *ibid.*
In caſe of an arreſt or embargo by a prince, though not an enemy, the inſured is entitled to recover againſt the inſurer. *ibid.*
In caſe of detention by a foreign power, which in time of war may have ſeized a neutral ſhip, in order to be ſearched for enemy's property, the charges conſequent thereon muſt be borne by the underwriter. 79
But a detention for non-payment of cuſtoms, or for navigating againſt the laws of thoſe countries, where the ſhip happens to be, ſhall not fall upon the underwriter. *Page* 80
The inſurers are liable for the payment of damage ariſing by the detention or ſeizure of ſhips, before the commencement of the voyage, where the riſk is "at and from" by the government of the country where the ſhip loads. 80, 81
Q. Whether this applies to a detention by our own government? *ibid.*
Before the inſured can recover in caſe of detention, he muſt abandon to the inſurer whatever claims he may have to the property inſured. 82
The time, within which the abandonment muſt be made in ſuch caſes was not till lately aſcertained in *England* by any poſitive rule. *ibid.*
A detention by particular ordinances, which contravene, or do not form a part of the law of nations, is a riſk within a policy of inſurance. 365

Deviation.

Is underſtood to mean a voluntary departure, without neceſſity or any reaſonable cauſe, from the regular and uſual courſe of the ſpecific voyage inſured. 294
Whenever this happens, the voyage is determined, and the inſurers are diſcharged from any reſponſibility. *ibid.*
The reaſon of this is, becauſe the ſhip goes upon a different voyage from that againſt which the inſurer undertook to indemnify. *ibid.*
It is not material whether the loſs be or be not an actual conſequence of the deviation; for the inſurers are in no caſe anſwerable for a ſubſequent loſs, in whatever place it happen, or to whatever cauſe it may be attributed. 294
Neither does it make any difference whether the inſured was or was not conſenting to the deviation. *ibid.*
A ſhip was inſured from *Dartmouth* to *Liverpool*; ſhe put into *Loo*; *a place ſhe muſt of neceſſity paſs by*; and although no accident befel her in going into or coming out of *Loo* (for ſhe was loſt after ſhe got out to ſea); it was held to be a deviation. 295

A ſhip

A ſhip being inſured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* paſs; and it was held to be a deviation. *Page* 295
If the maſter of a veſſel put into a port not uſual, or ſtay an unuſual time, it is a deviation. *ibid.*
If ſeveral places are named in the policy, the ſhip muſt go to thoſe places in the order in which they are named, unleſs ſome uſage, or ſome ſpecial facts be proved to vary the general rule. 298
If the deviation be but for a ſingle night, or for an hour, it is fatal. 298 *a*
Inſurance from *Liſbon* to *England* with liberty to call at a port in *Portugal*, held to mean a liberty to call at a port in the way between *Liſbon* and *England*. *ibid.*
A ſhip was bound from *Cork* to *Jamaica*, under convoy. Being of force, ſhe, with two other veſſels, took advantage of the night, and cruized in hopes of meeting with a prize; it was held a deviation. *ibid.*
But if a merchant ſhip carry letters of marque, ſhe may *chace* an enemy, though ſhe may not *cruize*, without being deemed guilty of a deviation. 299
The doctrine of deviation is applicable to an inſurance *on freight*. *ibid.*
Wherever the deviation is occaſioned by abſolute neceſſity; as where the crew forced the captain to deviate, the underwriter continues liable. 299 (*a*)
The juſtifications for a deviation ſeem to be theſe; to repair the veſſel; to avoid an impending ſtorm; to eſcape from an enemy; or to ſeek for convoy. 300
If a ſhip is decayed and goes to the neareſt port to refit, it is no deviation. 300, 301
Wherever a ſhip, in order to eſcape a ſtorm, goes out of the direct courſe; or, when in the due courſe of the voyage, is driven out of it by ſtreſs of weather; this is no deviation. 302
If a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return to the point from which ſhe was driven. *Page* 303
A deviation may alſo be juſtified, if done to avoid an enemy or to ſeek for convoy at the place of rendezvous. 308
A ſhip being inſured and warranted to depart with convoy from *Bremen* to *London*, ſet ſail from *Bremen* to the *Elbe*, under convoy of a *Dutch* man of war, where they were joined by two other *Dutch* men of war, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war. It was held that their going to the *Elbe*, though out of the way, was no deviation. 308
A ſhip was inſured from *London* to *Gibraltar*, warranted to depart with convoy. There was a convoy appointed for that trade at *Spithead*, but the ſhip was loſt on her way thither. The court held that the ſhip was protected by the inſurance to a place of general rendezvous. *ibid.*
Where a captain juſtifies a deviation by the uſage of a particular trade, there muſt be a clear and eſtabliſhed uſage; not a few vague inſtances only. 309
Wherever a ſhip does that, which is for the general benefit of all parties concerned, the act is as much within the ſpirit of the policy as if it had been expreſſed: and in order to ſay whether a deviation be juſtifiable or not, it will be proper to attend to the motives, end, and conſequences, of the act, as the true ground of judgement. 310
It has been held, that if a ſhip deviate from neceſſity, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe the underwriters will be diſcharged. *ibid.*
In ſuch a caſe nothing more muſt be done than what the neceſſity requires. 313
Even in an inſurance on a trading voyage, ſuch trade muſt be carried on with uſual and reaſonable expedition. 313 *a*, 314
A deviation *merely intended*, but never carried into effect, does not diſcharge the inſurers. 314
But if it can be ſhewn that the parties never intended to ſail upon the voyage inſured;

insured; if all the ship's papers be made out for a different place from that described in the policy: the insurer is discharged, though the loss should happen before the dividing point of the two voyages. *Page* 314

But where the *termini* of the voyage continue the same, an intention to go to an intermediate port, though that intention should be formed previous to the ship's sailing, will not vitiate, till actual deviation. 316 *a*

See also 316 *a*, note (*a*)

As it is settled that a *mere intention to deviate* will not vacate the policy, it follows as a consequence, and has been so held, that whatever damage happens before actual deviation, falls upon the underwriters. 316

Subject to the rules already advanced, deviation or not is a question of fact to be decided according to the circumstances of the case. 317

In cases of deviation, the premium is not to be returned. *ibid.* 377 note (*a*)

Breaking bulk, a deviation. 295

Double Insurance.

It is where the same man is to receive two sums instead of one; or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property. 280

Difference between a re-assurance and a double insurance. *ibid.*

Where a man makes a double insurance, he may recover his loss against which set of underwriters he pleases; but he can recover for no more than the amount of his loss. 281

But when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured. *ibid.*

But though a double insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value; as the master for wages; the owner for freight; one person for goods; and another for bottomry. 282

In what cases a man shall be said to make a double insurance; and when not, fully considered from *Page* 283 to 288

If the same man for his own account, *though not in his own name*, insures doubly, it is still a double insurance. 285

The laws of foreign countries, upon the subject of double insurance, are far from being uniform. 288

East-India Voyages.

THE usage of trade with respect to these voyages has been more notorious than in any other, the question having more frequently occurred. 46

The charter-parties of the *India* Company give leave to prolong the ship's stay in *India* for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general without limitation of time or place. 46

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in *India*, though not expressly mentioned in the policy. *ibid.*

Thus, where the insurance was "at "and from *Bengal* to any ports or "places whatsoever, in the *East-* "*Indies*, *China*, *Persia*, or elsewhere "beyond the *Cape of Good Hope*, "forwards and backwards, and dur- "ing her stay at each place, until "her arrival in *London*, &c." The captain when in *Bengal* entered into a new agreement for prolonging the ship's stay, and went several intermediate or country voyages, in the last of which she was lost; the insurers were held liable. 47

In an insurance "from *London* to "*Madras* and *China*, with liberty to "touch, stay, and trade, at any ports "or places whatsoever," the facts were; that when the ship arrived at *Madras*, she was too late to go to *China* that year, upon which she was sent by the council to *Bengal* to fetch rice,

rice, which voyage ſhe performed once, but in the ſecond attempt ſhe was loſt. The inſurers are anſwerable on account of the uſage. *P.* 49

In an inſurance on a ſhip, "at and "from *London* to *Bengal*, beginning "the riſk upon the ſhip at *London*, "and ſo to continue till the arrival "of the ſaid ſhip at *Madras* and *Ben*"*gal*, *with liberty to touch and ſtay at* "*any port or place in this voyage*;" the underwriters were held to be anſwerable for a loſs which happened in an intermediate voyage from *Madras* to *Viſagipatnam* for rice by order of the council. 50

However, the parties may, by their own agreement, prevent ſuch latitude of conſtruction. 51

Nor need this be done by expreſs words of excluſion, but if, *from the terms uſed*, it can be collected that the parties meant ſo, that conſtruction ſhall prevail. *ibid.*

Thus where the general words were reſtrained by the expreſſions "*in the outward or homeward bound voyage*;" and "*in this voyage*;" the court held that the policy only meant places in the uſual courſe of the voyage "to and from the places named." 51

Inſurance on a voyage undertaken in contravention of the rights of the *Eaſt India* Company, is void. 233

How their rights are affected by the treaty with *America*. 233 *a*

Election.

Election to abandon, when to be made. 172

Notice of abandonment muſt be given, though the ſhip and cargo have been ſold. 172 *a*

Embargo.

An embargo is an arreſt laid on ſhips or goods by public authority, to prevent ſhips from putting to ſea in time of war, and ſometimes alſo to exclude them from entering our ports. 78

Q. Whether a prince in time of war may make uſe of the veſſels he finds in his ports, to aſſiſt him in carrying on war? *ibid.*

Extraordinary wages paid to the ſeamen during an embargo, cannot be recovered againſt the inſurer *on the ſhip*. *Page* 54

The king of *Great Britain*, *in time of war*, may lay an embargo on ſhipping in the ports of his kingdom. Q. Whether he may do it in time of peace? 79

Q. Whether if an embargo be laid on by the *Britiſh* government, and a loſs enſue, the underwriters are liable? 81, 81 *a*, and 81 *b*, note (*a*)

The breach of an embargo is an act of barratry in the maſter. 91

If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, ſuch an inſurance is void. 234

Enemy.

The queſtion whether inſurances on the property of an enemy are politic, conſidered. 13, 240

Such inſurances are contrary to the law of *England*. 14 *ibid.*

How far trading with an enemy in time of actual war is legal. 237

What is neceſſary to be ſtated in a plea of alien enemy. 240, note (*a*)

Evidence.

Opinion of witneſſes is not evidence. 59, 198

The *onus* of proving the captain to be owner, ſo as to get rid of a charge of barratry, lies upon the underwriters. 94

A policy will not be ſet aſide on the ground of fraud, unleſs it be *fully* and *ſatisfactorily* proved, and the burthen of proof lies upon the perſon wiſhing to take advantage of the fraud. 214

But poſitive and direct proof of fraud is not to be expected; and from the nature of the thing circumſtantial evidence is all that can be given. *ibid.*

The nature of circumſtantial evidence conſidered. 215

The ſentence of a foreign court of Admiralty is concluſive, and binding upon all the world, as to every thing contained in it; and cannot be controverted

troverted collaterally in a civil ſuit. *Page* 353, 356

See *Admiralty*.

The firſt piece of evidence to ſupport an action on the policy is proof of the defendant's hand-writing to the policy. 404

No parole evidence of any agreement ſhall be admitted, which tends to contradict the written policy. 405

The inſured muſt alſo prove his intereſt in the thing inſured, by a production of all the uſual documents, bills of ſale, bills of parcels, bills of lading. &c. 406

Captain's proteſt delivered by the broker to the aſſurers to get the loſs ſettled is not evidence for the defendant. *ibid.*

Nor a ſentence of condemnation for non-ſeaworthineſs after a ſurvey, of the facts ſtated in it. *ibid.*

A man having purchaſed goods abroad, in order to prove his intereſt, produced a bill of parcels with the receipt of the ſeller to it, and proved his hand; it was held to be ſufficient evidence. *ibid.*

The plaintiff muſt prove that a loſs has happened by the very means ſtated in the declaration. 407

But where the loſs is averred to be by perils of the ſea, it is allowable to give the expence of the ſalvage in evidence upon ſuch a declaration. 409

Factor.

THE lien which a factor has upon the goods of his principal, is ſuch an intereſt, as will entitle him to recover on a general policy on goods. 11, 286

Felony.

Wilfully to caſt away, burn, or deſtroy, any ſhip to the prejudice of the owners of the ſaid ſhip, or any merchant loading goods thereon, or of the underwriter, is felony, without the benefit of clergy, in any captain, maſter, mariner, or other officer belonging to the ſhip ſo deſtroyed. 96, 219

Any perſon boring holes in a ſhip in diſtreſs, or ſtealing a pump belonging thereto, ſhall be guilty of felony without benefit of clergy. *Page* 135

Perſons convicted of ſtealing goods from a ſhip wrecked, or in diſtreſs, or of obſtructing the eſcape of any perſon from a wreck, or of putting out falſe lights to lead ſuch ſhip into danger, ſhall ſuffer as felons without benefit of clergy. *ibid.*

Where goods of ſmall value are ſtolen, without any circumſtances of cruelty, the offender may be indicted for petty larceny. *ibid.*

Perſons, in whoſe cuſtody ſhip-wrecked goods are found, not giving a ſatisfactory account, ſhall be committed to the common gaol for ſix months, or pay treble the value of ſuch goods. *ibid.*

Goods offered to ſale, ſuſpected of being ſhip-wrecked, ſhall be ſtopped, and the perſon ſo offering them, and not giving a ſatisfactory account, ſhall be committed to the common gaol, for ſix months, or pay treble the value of ſuch goods. *ibid.*

Perſons convicted of aſſaulting any magiſtrate or officer, when in diſcharge of his duty, reſpecting the preſervation of any ſhip, veſſel, goods, or effects, ſhall be liable to tranſportation for ſeven years. 137

Fire (Inſurance againſt).

Is a contract, by which the inſurer undertakes, in conſideration of the premium, to indemnify the inſured, againſt all loſſes, which he may ſuſtain in his houſe, or goods, by means of fire, within the time limited in the policy. 441

The *London* Aſſurance Company inſert a clauſe in their propoſals, by which they declare, that they do not hold themſelves liable for any damage by fire, occaſioned by an invaſion, foreign enemy, or any military or uſurped power whatſoever. *ibid.*

Under this proviſo it was held, that the inſurers were not exempted from loſs by fire, occaſioned by a mob at *Norwich*, which aroſe on account of the high price of proviſions. 442

The Sun fire-office, in addition to theſe words, add, "*civil commotion*," it was held that the company, under thoſe words, were exempted from loſſes occaſioned by rioters, who roſe in the year 1780, to compel the repeal of a ſtatute, which had paſſed in favour of the *Roman* catholics. *Page* 445

When a loſs happens, the inſured muſt give immediate notice of his loſs; and as particular an account of the value, &c. as the nature of the caſe will admit. He muſt alſo produce a certificate of the miniſter and church-wardens, as to the character of the ſufferer, and their belief of the truth of what he advances. 448

This certificate is held to be a *condition precedent* to his right of recovery. 449, note (*a*)

In inſurances againſt fire, the loſs may be either partial or total. 449

Theſe policies are not in their nature aſſignable; nor can the intereſt in them be transferred without the conſent of the office. *ibid.*

When any perſon dies, the intereſt ſhall remain to the heir, executor, or adminiſtrator, reſpectively, to whom the property inſured belongs; provided they procure their right to be indorſed on the policy, or the premium be paid in their name. 449

It is neceſſary the party injured ſhould have an intereſt or property in the houſe inſured, at the time the policy is made out, and at the time the fire happens; and therefore, after the leaſe of the houſe is expired, the inſured's aſſigning the policy does not oblige the inſurers to make good the loſs to the aſſignee. 450

The premium upon common inſurances is two ſhillings *per cent.* for any ſum not exceeding 1000 *l.* and half a crown from 1000 *l.* upwards. 456

Beſides which there is a duty to government of 2 *s. per cent.* *ibid.*

This tax does not extend to publick hoſpitals. *ibid.*

If a houſe were deſtroyed by a foreign enemy the day after the policy is made, there would be no return of premium. 457

Fraud vitiates this ſpecies of contract. *Page* 457

Foreign Ships.

Inſurances on foreign ſhips without intereſt are not within the ſtatute of 19 *Geo.* 2. c. 37. 265

But re-aſſurances on foreign ſhips are void. 279

Fort.

A fort may be inſured againſt an attack from an enemy, for the benefit of the governor. 13

France.

An account of its commercial and maritime regulations; and the diſtinguiſhed authors, who have written upon the ſubject of inſurances. Introd. xxxvi

Fraud.

Policies are annulled by the leaſt ſhadow of fraud or undue concealment of facts. 174

Both parties are equally bound to diſcloſe circumſtances within their knowledge. *ibid.*

If the inſurer, at the time he underwrote, knew that the ſhip was ſafe arrived, the contract will be void. *ibid.*

Caſes of fraud upon this ſubject are liable to a threefold diviſion; 1ſt, The *allegatio falſi*; 2d, The *ſuppreſſio veri*; 3d, Miſrepreſentation. The latter, though it happen by miſtake, if in a material part, will vitiate the policy, as much as actual fraud. *ibid.*

The policy was held to be void, where goods were inſured as the property of an ally, when in fact they were the goods of an enemy. 175

A ſhip was known to have ſailed from *Jamaica*, on the 24th of *November*; and the agent told the inſurer ſhe ſailed the latter end of *December*; the policy was declared void. 176

In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral; it was expreſsly found by the jury, that they were not neutral. The

The court, therefore, though the loſs happened by ſtorms, and not by capture, declared that the inſured could not recover. *Page* 176

Goods were inſured on board a ſhip, warranted *Portugueſe*. The goods were loſt by a different peril, but in fact the ſhip was not *Portugueſe*. The policy is void *ab initio*. 177

Concealment of circumſtances vitiates all contracts of inſurance. The facts upon which the riſk is to be computed, lie, for the moſt part, within the knowledge of the inſured only. The underwriter relies upon him for all neceſſary information; and muſt truſt to him that he will conceal nothing, ſo as to make him form a wrong eſtimate. 178

One having an account that a ſhip, deſcribed like his, was taken, inſured her, without giving any notice to the inſurers of what he had heard, the policy was decreed in equity to be delivered up. 179

The agent for the plaintiff two days before he effected the policy, received a letter from *Cowes*, in which is this expreſſion: "On the 12th of this "month I was in company with the "*Davy* (the ſhip in queſtion,) at "twelve at night loſt ſight of her "all at once; the captain ſpoke to "me the day before that ſhe was "leaky, and the next day we had a "hard gale." The ſhip, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, becauſe the letter was not communicated to the inſurer. *ibid.*

A ſhip was inſured "*at and from Ge-*"*noa*." The ſhip loaded at *Legborn*, and was originally bound for *Dublin*; but loſing her convoy, ſhe put into *Genoa* in *Auguſt*, and lay there till the *January* following. All theſe facts were known to the inſured, but not communicated to the inſurer: the policy was held to be void. 180

A ſhip being bound from the coaſt of *Africa* to the *Britiſh Weſt Indies*, ſailed from *St. Thomas's* on the coaſt of *Africa* on the 2d of *October*, a circumſtance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21ſt of *March*. The letter was not ſhewn, nor was any thing ſaid of her ſailing from *St. Thomas's*, but in the inſtructions "the ſhip was ſaid to have been "on the coaſt the 2d of *October*." The policy was held to be void. *Page* 181

The broker's inſtructions ſtated *the ſhip ready to ſail on the 24th of December*; the broker repreſented to the underwriter that the ſhip was in port, when, in fact, ſhe had ſailed the 23d of *December*. The policy was void. 182

But there are many matters, as to which the inſured may be innocently ſilent; 1ſt, As to what the inſurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what leſſens the riſk. An underwriter is bound to know particular perils, as to the ſtate of war or peace. 183

If a privateer is inſured, the underwriter needs not to be told her deſtination. *ibid.*

An inſurance was made on *Fort Marlborough* in the *Eaſt Indies* for twelve months againſt the attacks of an *European* enemy, for the benefit of the governor. The defence ſet up was an undue concealment of circumſtances, particularly the weakneſs of the fort, and the probability of its being attacked by the *French*. The court held that the policy was good. *ibid.*

The whole doctrine of concealment fully illuſtrated from page 183 to 193

A ſhip was inſured "from *London* to "*Nantz*, with liberty to call at "*Oſtend*." The ſhip's clearances and papers were all made out for *Oſtend*; but ſhe was never intended to go thither. After the policy was made, war was declared againſt *France*. Two defences were ſet up; 1ſt, That there was a fraud in clearing out the ſhip for *Oſtend*, when ſhe never was deſigned for that place. 2d, That as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defendant ought to have

had notice. The court held that neither of the objections was valid; for the first was the common usage; and of the second the insurer was bound to take notice. *Page* 193

An underwriter refused to pay a loss by capture, the ship being *Portuguese* and condemned for having an *English* supercargo on board, because the insured had not disclosed that circumstance. The court held that the condemnation was unjust, and was not such a circumstance as the insured was bound to disclose. 195

A representation is a state of the case, not forming a part of the written instrument or policy; and it is sufficient if it be substantially performed. 196, 202

If there be a misrepresentation it will avoid the policy as a fraud, but not as a part of the agreement. 197

Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is necessary that they make a part of the written instrument. 197

If a representation be false in any material point, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist. *ibid.*

The following instructions were shewn to the first underwriter, but not inserted in the policy, "Three thousand five hundred pounds upon "the ship *Julius Cæsar* for *Halifax*, "to touch at *Plymouth*, and any port "in *America*; *she mounts twelve* "*guns, and twenty men.*" These instructions were not shewn to the present defendant, but she was represented *generally as a ship of force.* At the time of her capture, she had on board 6 four-pounders, 4 three-pounders, 3 one-pounders, 6 swivels, and 27 men and boys in all, of which 16 only were men. The witness said he considered her as being stronger with this force, than if she had 12 carriage guns, and 20 men: and that there were neither men nor guns on board at the time of the insurance. The court held, that these instructions were only a representation; and that they had been substantially performed. *Page* 197

A ship was insured at and from *Port L'Orient* to the *Isles of France* and *Bourbon*, and to all or any ports or places where, and whatsoever, in the *East-Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, from place to place, and during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*. A slip of paper, at the time the policy was underwritten, was *wafered* to it, and shewn to the underwriters, on which was written the following representation: "The ship has had a "complete repair, and is now a fine "and good vessel, three decks. In-"tends to sail in *September* or *October* "next. Is to go to *Madeira*, the "*Isles of France*, *Pondicherry*, *China*, "the *Isles of France*, and *L'Orient*." The ship, in fact, did not sail till the 6th of *December*, and did not reach *Pondicherry* till the month of *July* following. She continued there till *August*, when, instead of proceeding for *China*, she sailed for *Bengal*, where having passed the winter, and undergone considerable repairs, she returned to *Pondicherry*, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken by the *Mentor* privateer. The usual time, in which the direct voyage is performed between *Pondicherry* and *Bengal* is six or seven days; but this ship was six weeks in going to, and two months in returning from *Bengal*, and lay off *Madras*, *Masulipatam*, *Visigapatam*, and *Tanore*, and took in goods at all those places. Lord *Mansfield* told the jury, that if no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed did not tend to encrease the risk, *this slip of paper being only a representation*, the plaintiff was entitled to their verdict. 202

If

If the misrepresentation be in a *material* point, it will avoid the policy; even though it happen by mistake. *P.* 204
Thus in a policy on a ship from *New York* to *Philadelphia*, the broker represented to the insurer that the *ship was seen safe in the Delaware on the 11th of December* by a ship which arrived at *New York*; whereas in fact the ship was lost on the 9th of *December*; the policy was held to be void, although there was no suspicion of fraud. 205
The same rule holds if the broker conceal any thing *material*, though the only ground for not mentioning them should be that the facts concealed appeared immaterial to him. 207
But the thing concealed must be some *fact*, not a *mere speculation or expectation* of the insured. *ibid.*
Thus where a broker insuring several vessels, speaking of them all said, "which vessels are *expected* to leave "the coast of *Africa* in *November* or "*December*;" the policy was held good, although in fact the ship in question had sailed in the month of *May* preceding. *ibid.*
Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case the contract is founded in deception, and the policy is consequently void. 208
This rule prevails, even though the act cannot be at all traced to the owner of the property insured. 209
A policy will not be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved; and the burthen of proof lies on the person wishing to take advantage of the fraud. 214
But positive and direct proof of fraud is not to be expected; and from the nature of the thing circumstantial evidence is all that can be given. 214
The question, whether the premium is to be returned by the underwriter, where the insured has been guilty of fraud, considered. 215
The ordinances of foreign states declare, for the most part, that it shall. *ibid.*
In *England* there has been no legislative regulation; and the courts of justice had not till lately adopted any general rule upon the subject. *Page* 216
In two or three instances, where the underwriters have been relieved in Chancery from the payment of the sums insured on account of fraud, the decree has directed the premium to be returned. *ibid.*
The question came on to be considered in the King's Bench; but the trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the court of King's Bench considered this offer in the same light as if he had paid the money into court, and therefore the question remained undecided. 217
But in a case where the fraud was of a very gross and heinous nature, Lord *Mansfield* told the jury, that the premium should not be restored to the insured. 218
In all cases of *actual* fraud on the part of the insured or his agent, the premium is not to be returned. *ibid.*
It is clear that if the underwriter has been guilty of fraud, an action *lies* against him at the suit of the insured, to recover the premium. *ibid.*
By several foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe; sometimes amounting even to death. *ibid.*
No punishment except that of annulling the contract, has as yet been declared by the law of *England*. 219
But if any captain, &c. wilfully destroy the ship to which he belongs, to the prejudice of the owner of the ship, or of the goods loaded thereon, or of the underwriters, he shall suffer death as a felon. *ibid.*
Fraud vitiates policies on lives, as well as those on marine insurances. 437
It has the same effect on policies insuring against fire. 457

Freight.

The freight or hire of ships, is a subject of insurance. 9
In an insurance upon *freight*, the insured, if the ship be prevented by accident

from ſailing, cannot recover the value of the freight, which *he would have began to earn if the ſhip had ſailed.* *Page* 35

But if the policy be a valued policy, and part of the cargo be on board when ſuch accident happens, the reſt being ready to be ſhipped, the inſured may recover to the whole amount. 36

So in an *open* policy if the aſſured be under a charter-party for a ſpecific freight. 36 *a*

The underwriter upon the *goods* is not liable for *freight* paid to the owner of the ſhip. 53

Freight muſt contribute to a general average. 128

Furniture of Ship.

What is included under that. 56, 56 *a*, note

Gaming Policies. See title *Wager Policies.*

General Average. See *Average.*

Gold.

Whether inſurable as Goods. 22

Goods.

Goods laſhed on deck are not included under a general inſurance *on goods.* 21

Greeks.

SOME account of their commerce; they are ſuppoſed to have been unacquainted with inſurance. Introd. viii

Hanſeatick League.

AN account of its origin and decline. Introd. xxxiv

Huſband of a Ship.

The huſband of a ſhip has no right to inſure for any part owner, without his particular direction; nor for all the owners in general, without their joint direction. 19

Jettiſon or *Jetſon.* See *Average.*

Jewels.

Whether inſurable as goods. *Page* 22

Contribute to a general average. 126

Illegal Voyages.

WHENEVER an inſurance is made on a voyage expreſsly prohibited by the common, ſtatute, or maritime law of this country, the policy is void. 232

The goods on board a ſhip were inſured "at and from *London* to *New-York*, warranted to depart with convoy from the Channel for the voyage." She had proviſions on board, which ſhe had a licence to carry to *New-York*, under a proviſo in the prohibitory act of 16 *Geo.* 3. c. 5. But, *one half of the cargo, including the goods which were the ſubject of this inſurance, was not licenſed.* The commander in chief had iſſued a proclamation to allow the entry of unlicenſed goods; but he had no authority under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods. The ſtatute prohibits all intercourſe with *New-York*, and confiſcates all ſhips trading to that place, unleſs they have a licence. The court held the policy was void. *ibid.*

It is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot ſubſtantiate a contract in direct contradiction to law. 234

If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, ſuch an inſurance is void. *ibid.*

An inſurance upon a ſmuggling voyage prohibited by the revenue laws of this country would be void. *Aliter*, if merely againſt the revenue laws of a foreign ſtate, with the knowledge of the underwriter. 195, 236, 237

No country pays attention to the revenue laws of another. *ibid.*

The queſtion, how far trading with an enemy, in time of actual war, is legal, conſidered and diſcuſſed from page 237 to 240

The queſtion how far inſurances upon the goods of an enemy are expedient, conſidered, from page 240 to 243

Whether

Whether they are expedient or not, ſuch inſurances are contrary to law. *Page* 240

No inſurance can be made upon a voyage to a beſieged fort or garriſon, with a view of carrying aſſiſtance to them; or upon ammunition, warlike ſtores, or proviſions. 243

Inſurance.

Inſurance is a contract, by which the inſurer undertakes, in conſideration of a premium, equivalent to the hazard run, to indemnify the inſured againſt certain perils and loſſes, or againſt a particular event. Introd. ii

The utility of this contract. Introd. *ibid.*

The origin of it traced. Introd. iii

The queſtion, whether it was known to the ancients, conſidered. Introd. *ibid.*

Inſurances ſuppoſed to have originated in *Italy*. Introd. xxvi

The *Italians* brought them into the various ſtates of *Europe*, and into *England*. Introd. xxvi. xlii

Inſurances are merely ſimple contracts. 1

What kinds of property are the object of inſurance. 9

Bottomry and reſpondentia are a ſpecies of property which may be inſured. *ibid.*

But it muſt be ſpecified in the policy to be ſuch an intereſt, otherwiſe the policy is void. *ibid.*

Unleſs the uſage of the trade takes it out of the general rule. 11

But where the inſurance is upon goods generally, the lien which a factor has upon the goods of his principal, when a balance is due, is ſuch an intereſt as will entitle him to recover upon ſuch a policy. *ibid.*

Inſurances on the wages of ſeamen are prohibited. 12

A governor may inſure the fort againſt the attack of an enemy, for his own benefit. 13

Inſurances on enemy's property contrary to law. 13, 14, 240

In an inſurance *on goods* generally, goods laſhed on deck, the captain's cloaths and ſhip's proviſions are not included, unleſs ſpecifically named. *Page* 21

Inſurance from *A.* to ——— is void. 22

Inſurances for time are very frequent, as on a ſhip for twelve months. 58

Inſurances upon a voyage prohibited by the common, ſtatute, or maritime law of the country, are void. 232

See title *Illegal Voyages.*

Inſurances on a voyage to a beſieged fort or garriſon, with a view of carrying aſſiſtance to them, or upon ammunition, warlike ſtores, or proviſion, are prohibited. 243

Inſurances upon prohibited goods.

See title *Prohibited goods.*

Inſurances void by ſtat. 19 *Geo.* 2. c. 37.

See *Wager Policies.*

Inſurances on Lives. See title *Lives.*

Inſurances againſt Fire. See title *Fire.*

Inſurers.

What perſons may be inſurers. 5

Every individual may be an inſurer or underwriter. 9

But no ſociety or partnerſhip can underwrite, except the Royal Exchange Aſſurance Company, and the *London* Aſſurance Company. *ibid.*

What ſhall be conſidered as a partnerſhip within the ſtatute of 6 Geo. 1. c. 18. 8, 8 *b*

Inſurers are liable for loſſes, which happen in the ſhip's boats, when landing the goods inſured. 23

Aliter, if in the boat of the owner of the goods. *ibid.*

Q. Are the inſurers liable for thefts committed by the people on board the ſhip? 25

Inſured.

The name of the inſured muſt be inſerted in the policy; or the name of the agent who effects it *as agent*. 15, 16, 17

This matter is now regulated and conſiderably altered by 28 Geo. 3. c. 56. 18, 19

Q. Whether an action lies againſt the inſured for premiums at the ſuit of the underwriter? *Page* 26
The broker, who effects the policy, may maintain ſuch an action for premiums paid on his account. 27

Intention.

The intention of the parties, and not the literal meaning of the words, is to be attended to in the conſtruction of policies. 30

Intereſt or no Intereſt. See title *Wager Policies.*

Intereſt (Inſurable).

A ſpecial intereſt in goods may be inſured, ſuch as the lien of a factor. 11
Money expended for the uſe of the ſhip by the captain is inſurable, as goods, ſpecie, and effects, eſpecially if an uſage has prevailed. *ibid.*
Wages of ſeamen, and commodities in lieu of wages, not inſurable; but the goods of the captain, or his ſhare in the ſhip, may. 12
The governor of a factory abroad has an inſurable intereſt in the ſafety of the place. 13
The owner of a ſhip having entered into a charter-party to go from the *Thames* to *Teneriffe*, and there to load a cargo of wines at a ſpecific freight, has a good inſurable intereſt in ſuch freight: and if the policy be underwritten *at and from London to Teneriffe*, and from thence to the *Weſt Indies*, he may recover, if the ſhip be loſt in her way to *Teneriffe*. 36 *a*
The profits expected to ariſe on a cargo of moloſſes, belonging to the plaintiff, who had a contract with government to ſupply the army with ſpruce beer, are a good inſurable intereſt. 267
Q. Whether plaintiff's *commiſſions* as conſignee of a cargo are an inſurable intereſt? 268, note (*a*)
Officers and crew of a ſhip, upon a joint capture by army and navy, have an inſurable intereſt in the capture, before condemnation. 269
So of captors of ſhips in the voyage home, for the purpoſe of bringing them to adjudication in the court of Admiralty. *Page* 270
So the *Dutch* commiſſioners have an inſurable intereſt in the ſhips ſeized at ſea to be brought into the ports of this kingdom. 270 *a*
A creditor of a houſe abroad has an inſurable intereſt in goods conſigned to a third perſon for the purpoſe of paying his debt, though the creditor had not ordered the goods to be ſent. 270 *a*
See alſo the following caſe. 270 *b*
Various perſons may inſure various intereſts on the ſame thing, and each to the whole value. 282
Two partners purchaſed a ſhip under a regular bill of ſale, conformable to Lord *Hawkeſbury*'s act, (26 Geo. 3. ch. 60.) and they afterwards took in two other partners, who paid their reſpective ſhares in the ſhip, but there was no transfer to them under the ſtatute, and it was held that the *four* partners had not *an inſurable intereſt in the freight.* 406 (note)
A merchant abroad, intereſted in goods, mortgages them to his creditor here for payment of money at a certain day, the mortgagor has an inſurable intereſt, though the mortgage become abſolute before the order for inſurance arrives. 406
The indorſer of a bill of lading has ſtill an inſurable intereſt, if it appear that the effect of the indorſement was only intended to bind the net proceeds, in caſe the goods arrived. 406, note (*a*)
A perſon holding a note given for money won at play, has not an inſurable intereſt in the life of the maker of the note. 432
But a creditor has ſuch an intereſt in the life of his debtor, that he may inſure. 432, 439
Executor of a creditor may maintain an action on a policy made by himſelf. 432 *a*

Lading (Bill of).

A BILL of lading is an acknowledgement under the hand of the captain, that he has received certain goods,

which he undertakes to deliver to the perſon named in the bill of lading; it is aſſignable in its nature, and by *indorſement* the property veſts in the aſſignee. *Page* 406, note (*a*)

Where ſeveral bills of lading of different imports have been ſigned, no reference is to be had to the time when they were firſt ſigned by the captain: but the perſon who firſt gets one of them by a legal title from the owner or ſhipper, has a right to the conſignment. 406

Where bills of lading on the face of them are apparently different, and yet conſtructively the ſame, and the captain has acted *bonâ fide*, a delivery according to ſuch legal title will diſcharge him from them all. *ibid.*

But if the intention of the parties appears to have been to bind the net proceeds only, in caſe of the arrival of the goods, an inſurance made on account of the indorſer is good. *ibid.*

Lien.

The broker has a lien upon the policies in his hands for his general balance. 403, note (*b*)

Lighters.

Loſs of goods in ſhip's lighters falls upon the underwriters: *aliter*, if in the owners lighters. 23

Lives (Inſurances upon).

INSURANCE upon life is a contract, by which the underwriter, for a certain ſum, proportioned to the age, health, and profeſſion of the perſon, whoſe life is the object of the inſurance, engages that that perſon ſhall not die within the time limited in the policy; or if he do, that he will pay a ſum of money to him, in whoſe favour the policy was granted. 429

The advantages reſulting from this ſpecies of contract ſtated. *ibid.*

It is impoſſible to aſcertain its antiquity. 430

No inſurance ſhall be made on the life or lives of any perſon or perſons; wherein the perſon, for whoſe uſe the policy is made, *ſhall have no intereſt, or by way of gaming or wagering*: but ſuch inſurance ſhall be null and void. *Page* 431

The holder of a note for money won at play has not an inſurable intereſt in the life of the maker of the note. 432

But a *bonâ fide* creditor has an inſurable intereſt in the life of his debtor. *ibid.*

In a life inſurance, the inſurer undertakes to anſwer for all thoſe accidents, to which the life of man is expoſed, except ſuicide, or the hands of juſtice. 433

The death muſt happen within the time limited in the policy; otherwiſe the inſurers are diſcharged. *ibid.*

If a man receive a mortal wound during the exiſtence of the policy, but does not in fact die till after, the inſurers are not liable. *ibid.*

But if a man whoſe life is inſured, goes to ſea, and the ſhip in which he ſailed is never heard of afterwards, the queſtion whether he did or did not die within the term inſured, is a fact for the jury to aſcertain from the circumſtances. *ibid.*

This ſort of policy being on the life or death of man, does not admit of the diſtinction between total and partial loſſes. 434

In a life inſurance it has been held, that if the inſurer become bankrupt before the loſs happens, the perſon intereſted might prove the debt under the commiſſion, as if the loſs had happened before it iſſued. 434, 435

A policy was made for one year from the day of the date thereof: the policy was dated 3d *Sept.* 1697. The perſon died on the 3d *Sept.* 1698, about one o'clock in the morning; and the inſurer was held liable. 436

It is now uſual to inſert in the policy "the firſt and laſt days included." *ibid.*

Fraud equally vitiates policies on lives, as in the caſe of marine inſurances. 437

Where there is a warranty that the perſon is in good health, it is ſufficient that he be in a reaſonable good ſtate of

of health, for it never can mean that he is free from the ſeeds of diſorder. *Page* 437

If the perſon whoſe life was inſured, laboured under a particular infirmity, if it be proved by medical men, that in their judgment it did not at all contribute to his death, the warranty of health has been fully complied with, and the inſurer is liable. 438

If the perſon, whoſe life was inſured, ſhould commit ſuicide, or be put to death by the hands of juſtice, the next day after the riſk commenced, there would be no return of premium. 440

London.

What ſhall be deemed the port of *London.* 338

London Aſſurance Company.

Erected by royal charter, authorized by ſtat. 6 Geo. 1. ch. 18. 7, 8, 9

This, and the Royal Exchange Aſſurance Company, are the only ſocieties which may inſure. 8

The privileges of the *South Sea* and *Eaſt India* Companies preſerved. *ibid.*

This company has a common ſeal. 6

It rejects the words "*or the ſhip be ſtranded,*" in the memorandum at the foot of the policy. 21

This company, when ſued in an action of debt, may plead generally, that *they owe nothing*, and give the ſpecial matter in evidence. 397

So when ſued in *covenant*, they may plead generally, "that *they have not broke their covenant.*" *ibid.*

This company obtained his majeſty's charter to enable them to make inſurances upon lives. 430

Loſs.

The loſs muſt be a *direct and immediate conſequence* of the peril inſured, and not a remote one, in order to entitle the inſured to recover. 56

Loſs by Perils of the Sea, vide *Perils of the Sea.*

Loſs by Capture, vide *Capture.*

Loſs by Detention, vide *Detention.*

Loſs by Barratry, vide *Barratry.*

Of an Average or partial Loſs, vide *Partial Loſſes.*

Loſt or not Loſt.

Theſe words peculiar to *Engliſh* policies. *Page* 25

Malt.

Is included under the word *corn* in the memorandum. 112

Market.

THE riſe or fall of the market is a charge, which never falls upon the inſurer. 98, 104, 109

Maſter of Ships.

The name of the *maſter* muſt be inſerted in the policy. 19

Neither the maſter's cloaths, nor goods laſhed on deck, are included under a general inſurance *on goods.* 21

Whatever is done by the maſter of the ſhip in the uſual courſe of the voyage, neceſſarily *et ex juſta cauſa*, though a loſs happen thereon, the underwriter ſhall be anſwerable. 30

A *miſtake* of the maſter cannot be called a *peril of the ſea.* 62

Of barratry of the maſter, ſee *Barratry.*

The wearing apparel of the maſter is excepted from the allowance of ſalvage. 140

Memorandum.

The memorandum at the foot of the policy exempts the underwriters from partial loſſes not amounting to 3 *per cent.* unleſs it ariſe from a general average. 20, 21, 101

It alſo provides, that the underwriters will not anſwer for any partial loſs on corn, fiſh, ſalt, fruit, flour, or ſeed, unleſs occaſioned by a general average or the ſtranding of the ſhip, nor are they liable for any partial loſs on ſugar, tobacco, hemp, flax, hides, and ſkins, under 5 *per cent.* 20

If

If three cheſts of goods out of 101 be wholly ſpoiled, will the underwriter be liable? *Page* 102

Corn is a general expreſſion, and has been held to include *peas* and *beans* and *malt*. 112

The word Salt has been held not to include Salt-petre. 113

It has been held that the underwriters are not anſwerable, within that part of the memorandum which exempts them from all partial loſſes to corn, fiſh, ſalt, fruit, or ſeed, as long as the commodity ſpecifically remains, although wholly unfit for uſe. 112

This was held with regard to a cargo of *wheat*, partially damaged by a ſtorm. 113

A cargo of fiſh arrived, but was ſtinking, and wholly unfit for uſe, the inſurer was held not to be liable. 114

So of a cargo of fruit. 115

A cargo of *peas* arrived at the port of deſtination; but they were ſo much damaged, that the produce was three fourths leſs than the freight; the inſurer was held to be diſcharged. 116

The effect of the memorandum diſcuſſed. 115

Miſdemeanor.

Any perſon, except thoſe mentioned in the ſtat. 12 *Anne*, ſtat. 2. ch. 18. entering a ſhip in diſtreſs, without leave of the ſuperior officer, or of the officer of the cuſtoms, or moleſting or hindering them in the preſervation of the ſhip, or defacing the marks of the goods on board, ſhall make double ſatisfaction, or be ſent to the houſe of correction for 12 months. 134

If goods ſtolen from ſuch ſhip ſhall be found on any perſon, they ſhall be delivered to the true owner, or ſuch perſon ſhall pay treble the value. *ibid.*

Miſſing Ship.

A ſhip that has been miſſing for a conſiderable time, ſhall be conſidered as having foundered at ſea. 63

In practice, this time has been generally fixed to ſix months after the ſhip's departure for any part of *Europe*, or twelve months, if for a greater diſtance. 64

Miſtake.

Q. Whether inſurers liable for thoſe of the captain? *Page* 62

Miſrepreſentation, vide title *Fraud*, &c.

Money.

Whether inſurable as goods. 22

Contributes to a general average. 128

Mooring.

What ſhall be deemed mooring in good ſafety. 35, 35 *a*

Name.

THE name of the inſured muſt be inſerted in the policy; or the name of the agent affecting it, *as agent*. 15, 16, 17

It is now ſufficient to inſert the name of the perſon actually intereſted, or that of the conſignor or conſignee of the goods, or the names of thoſe who receive the orders to inſure, or who ſhall give the orders to effect the inſurance. 18, 19

The name of the ſhip and maſter muſt be inſerted in the policy. 19

But the ſhip may be changed in the voyage, if neceſſity require it. 20

Navigation.

Inſurances which tend to a breach of the navigation acts are void. 250 to 254

Negligence.

Action lies againſt an agent who neglects to inſure. See titles Action and Agent. 303

Neutrality.

A neutral ſhip is not obliged to ſtop to be ſearched; the ſearcher does it at his peril, it is a caſe of improper detention, for the coſts of which the inſurer is liable. 79, 80, 364

This point is now decided otherwiſe, and a ſhip muſt ſtop to be ſearched. 365, 365 *a*

If

If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. *Page* 350
In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral, it was expreſsly found by the jury that they were not neutral. The court, therefore, though the loſs happened by ſtorm, and not by capture, declared that the contract was void. *ibid.*
If the ſhip and property are neutral when the riſk commences, this is a ſufficient compliance with a warranty of neutrality. 351, 353
The inſurer takes upon himſelf the riſk of war and peace. 352
If the property be neutral at the time of ſailing, and a war break out the next day, the inſurer is liable. 353
For the effect of the ſentence of a foreign court of Admiralty upon the queſtion of neutrality, ſee *Admiralty*.

Notice.

Of abandonment when to be given. 172

Oleron (Laws of).

AN account of them. Introd. xxx
They do not treat of inſurances. Introd. xxxii

Open Policy.

In an *open* policy, the value of the property is not mentioned; but muſt be proved at the trial. 1, 103

Opinion. See *Evidence*.

Owner.

A ſhip's huſband has no right to inſure for the reſt of the owners, without their direction. 19

Partial Loſſes.

AVERAGE loſs, in policies of inſurance, means a particular partial loſs. 99
It is leſs ambiguous, to call it a *partial*, than an average loſs. *Page* 99
Partial loſs, when applied to the ſhip, means a damage, which ſhe may have ſuſtained in the courſe of the voyage, from ſome of the perils mentioned in the policy: when to the cargo, it means the damage which the goods have ſuffered from ſtorm, &c. though the whole or the greater part thereof may arrive in port. 101
Theſe loſſes fall upon the underwriter, if they amount to 3*l. per cent.* 101, 112
But if a loſs, ariſing from *a general average*, ſhould be under 3*l. per cent.* ſtill the underwriter is liable. 101
Suppoſe 101 cheſts of goods be ſhipped, and three of them be wholly ſpoiled: Q. Will the underwriter be liable? 102
In caſe of a partial loſs, the value of the policy can be no guide to aſcertain the damage, but it becomes the ſubject of proof as in caſe of an open policy. 103
When goods are partially damaged, the underwriter muſt pay the owner ſuch proportion of the prime coſt or value in the policy, as correſponds with the proportion or diminution in value occaſioned by the damage. *ibid.*
The proportion is aſcertained in this way; where an entire thing, as one hogſhead of ſugar, happens to be ſpoiled, if you can fix whether it be a third or a fourth worſe, then the damage is aſcertained. 104, 108
This can only be done at the port of delivery where the whole damage is known and the voyage is completed. 104
Whether the price of the commodity be high or low, it equally aſcertains the proportion of damage. This proportion the underwriter muſt pay, not of the value for which it ſold, or the market-price of the commodity; but of the value ſtated in the policy. *ibid.*
When it is an open policy, the invoice of the original coſt, with the addition of all charges, and the premium of inſurance, ſhall be the ground of the computation. 104

But whether the goods arrive at a good or bad market, it is immaterial to the inſurer. *Page* 104
The true way of eſtimating the loſs is to take the value of the commodity at the fair invoice price. *ibid.*
Theſe rules can only apply to caſes where there there is a ſpecific deſcription of goods. 111
Where the property is of various kinds, an account muſt be taken of the value of the whole, and a proportion of that as the amount of the goods loſt. *ibid.*
Q. Whether goods partially damaged may be opened, exceptin the preſence of the inſurers or their agents? *ibid.*
No loſs ſhall be deemed total ſo as to charge the inſurers within the meaning of that part of the memorandum which exempts them from partial loſſes happening to corn, fiſh, ſalt, fruit, flour, and ſeed, ſo long as the commodity ſpecifically remains, though perhaps wholly unfit for uſe. 112
This was held with reſpect to a cargo of wheat, which was partially damaged in a ſtorm. 113
The ſame with reſpect to a cargo of fiſh, which was ſtinking and of no value when examined. 114
A cargo of *peas* was ſo much damaged, that the produce was three-fourths leſs than the *freight*; but as it in fact arrived at the port of deſtination, the underwriter was held not to be liable. 116.
In policies upon lives, there cannot, from the nature of the event, be a partial loſs. 434
But there may in inſurances againſt fire. 4[illegible]

Of Adjuſting a partial Loſs. See *Adjuſtment.*

Partnerſhip.

No ſociety or partnerſhip can underwrite, except the Royal Exchange and the London Aſſurance Companies. 9
What ſhall be a partnerſhip within the ſtatute 6 *Geo.* 1. ch. 18. 8, 8 *a*, and 8 *b*

Payment of Money into Court.

The underwriters were empowered by ſtatute to pay money into court upon any diſpute; and then the inſured proceed at their peril. *Page* 403

People.

People, in the clauſe of a policy reſpecting detention, means the governing power of the country. 78

Perils of the Sea.

Every accident, happening by the violence of wind or waves, by thunder and lightning, by driving againſt rocks, or by the ſtranding of the ſhip, may be conſidered as a peril of the ſea. 61
For ſuch loſſes the underwriter is anſwerable. *ibid.*
A ſhip driven by the wind on an enemy's coaſt, and there captured, having ſuſtained no damage from the wind, ſhall be ſaid to be loſt by capture. *ibid.*
An action was brought to recover the value of certain ſlaves inſured by the policy. The facts were, that the captain miſſed the iſland for which he was bound, and their water running ſhort, ſome of the ſlaves were thrown overboard to preſerve the reſt; and the declaration ſtated the loſs to have happened by perils of the ſea. But it was held that *the miſtake* of the captain could not be called *a peril of the ſea.* 62
A loſs of ſlaves by death from failure of proviſions, occaſioned by delay from ſtormy weather, is not a loſs by perils of the ſea. 63
Deſtruction of a ſhip by worms infeſting the rivers of *Africa*, is not a peril of the ſea. *ibid.*
A ſhip which is never heard of, after her departure, ſhall be preſumed to have periſhed at ſea. 63
This was held in an action on a policy upon the ſhip from *North Carolina* to *London*; and the loſs was ſtated to be by ſinking at ſea; the evidence to ſupport this averment was, that after

after ſailing from port ſhe had never been heard of. *Page* 63
The ſame was held in a caſe, where a ſhip had been captured and ranſomed at ſea, but was never afterwards heard of, and never arrived at her port of deſtination. *ibid.*
In *England* no time is fixed, within which payment of a loſs may be demanded from the underwriter, in caſe the ſhip is not heard of. 64
A practice, however, prevails among merchants, that a ſhip ſhall be deemed loſt, if not heard of within ſix months after her departure for any part of *Europe*, or within twelve, if for a greater diſtance. *ibid.*

Petty Average.

Conſiſts of ſuch charges, as the maſter is obliged to pay, by cuſtom, for the benefit of the ſhip and cargo; ſuch as pilotage, beaconage, &c. 100
Theſe never fall upon the underwriter. *ibid.*
Another ſenſe, in which this word is underſtood, is when we ſpeak of a ſmall duty, which merchants, who ſend goods in the ſhips of other men, pay to the maſter, over and above the freight, for his care and attention. *ibid.*
This is a charge which never falls upon the underwriter. *ibid.*

Pilot. Vide *Sea-worthineſs.*

Pirates.

The underwriter, by expreſs words in the policy, undertakes to indemnify againſt the attacks of pirates. 61

Plea. See *Declaration.*

Policy.

A policy is the inſtrument by which the inſurance is effected. 1
Policies are of two kinds; *valued* and *open* policies: the difference between them. *ibid.*
They are only ſimple contracts; but of great credit. *ibid.*
Cannot be altered when once they are ſigned. *ibid.*
Unleſs there be ſome written document to ſhew that the meaning of the parties was miſtaken; or unleſs they be altered by *conſent.* *Page* 2, 3
A policy is a ſpecies of property for which trover will lie at the inſtance of the inſured, if it be *wrongfully* withheld from him. 4
The written clauſes in a policy will controul the printed words. 5
The form of the policy now uſed is two hundred years old. 15
Very irregular and confuſed, and often ambiguous. *ibid.*
There are nine requiſites of a policy. *ibid.*
The name of the perſon inſured.
This is regulated by ſtat. 25 *Geo.* 3. c. 44. and 28 *Geo.* 3. c. 56 15, 18, and 19
Upon the former act it has been held, that if an agent effects a policy for the principal reſiding abroad, his name muſt be inſerted in the policy *as agent.* 16
Q. When the principal reſides abroad, muſt not the agent live in *England?* 16, 17
The names of the ſhip and maſter; unleſs the inſurance be general, "*on any* "*ſhip or ſhips.*" 19
Whether the inſurance be made on ſhips, goods, or merchandizes. 20
As to the memorandum at the foot of the policy, ſee *Memorandum.*
A policy *on goods* generally does not include goods laſhed on deck, the captain's cloaths, or the ſhip's proviſions. 21
A policy muſt contain the name of the place at which the goods are laden, and to which they are bound. 22
A policy from *L.* to —— is void. *ibid.*
When the riſk commences, and when it ends. On the goods it uſually begins from the loading, and continues till they are ſafely landed: on the ſhip, from her beginning to load at *A.* and continues till ſhe arrive at the port of deſtination, and be there moored 24 hours. *ibid.*
The various perils againſt which the underwriter inſures. 24
Q. Whether the underwriter is liable for theft committed by the people on board;

board; and for loſs ariſing from bad ſtowage, &c. *Page* 24
The policy is frequently made with the words, *loſt or not loſt*, in it: which add greatly to the riſk. 25
The policy muſt contain the premium or conſideration for the riſk. 26
The day, month, and year, on which the policy was executed, muſt be inſerted. 27
The policy muſt be duly ſtamped. 28

Vide *Stamp*.

As to the Conſtruction of the Policy, ſee *Conſtruction*.

Of Policies on Eaſt India Voyages, ſee title *Eaſt India Voyages*.

Of Policies upon gaming or wagering Contracts, ſee title *Wager Policies*.

Practice.

Account of the modern improvements in the practice and proceedings upon policies of inſurance. Introd. xlix

Premium.

The premium is the foundation of the promiſe or *aſſumpſit*. 26
It is in the policy acknowledged by the inſurer to be received at the time of underwriting. *ibid.*
Q. Whether after this the inſurer could maintain an action againſt the *inſured himſelf* for the premiums. *ibid.*
In practice, the inſured generally act by a broker, and by the cuſtom, an action may be maintained againſt him, notwithſtanding the acknowledgement in the policy. *ibid.*
The broker may alſo maintain an action againſt the aſſured for premiums paid on his account. 27

See *Fraud*.

When the Premium ſhall be returned, ſee title *Return of Premium*.

Profits.—See *Intereſt* (*Inſurable*).

Prohibited Goods.

All inſurances upon commodities, the importation or exportation of which is prohibited by law, are void. *Page* 244
This rule prevails, whether the inſurer did or did not know that the ſubject of the inſurance was a prohibited commodity. *ibid.*
The parliament of *England* has paſſed a law, inflicting a penalty of 500 *l.* on the inſurer, who ſhould, by way of inſurance, procure the importation of prohibited goods; and a like penalty on the inſured. 245
By a ſubſequent law, the importation of any foreign alamodes or luſtrings, by way of inſurance or otherwiſe, without paying the duties, is expreſsly prohibited. 247
Whoever, by way of inſurance, undertakes to export wool from *England* to parts beyond the ſeas, ſhall be liable to pay 500 *l.* 248
The like penalty is inflicted on the inſured. *ibid.*
Beſides which all inſurances on woollen goods are declared void. 249
Perſons making ſuch inſurances on wool, &c. are liable for the firſt offence to a fine of 50 *l.* and ſix months ſolitary impriſoment. The ſame penalty on the inſured; and the inſurance is void. *ibid.*
Inſurances made to protect ſmuggled goods are void. 250
Inſurances, which tend to a breach of the navigation acts, are void. 250 to 254
Inſurances on goods prohibited by royal proclamation in time of war are void. 254
Goods, which from their nature are contraband, enumerated. 255
Inſurances upon goods, the exportation or importation of which are prohibited only by the revenue laws of other countries, are valid in *England*. 256
The opinions of foreign writers upon this queſtion, conſidered. 257, 258

Proof. See *Evidence*.

Proteſt.

Proteſt.

Proteſt ſhewn by plaintiff to defendant not evidence for the defendant. *Page* 406

Proviſions of a Ship.

Are not included under a general inſurance on *goods*. 21
But proviſions ſent out in a ſhip for the uſe of the crew are protected by a policy on the ſhip and *furniture*. 56
Proviſions expended during a detention to repair, or detention by an embargo, cannot be recovered againſt the inſurer on the *ſhip or goods*. 52, 54
Whether they fall into a general average? 125, 126
Ship's proviſions do not contribute to a general average. 127

Ranſoms.

Are prohibited by ſtatute; and money paid for ranſoming a ſhip cannot be recovered from the underwriters. 69, 167

Re-Aſſurance.

RE-ASSURANCE is a contract, which the firſt underwriter enters into, in order to relieve himſelf from thoſe riſks which he has previouſly undertaken by throwing them upon other underwriters, who are called Re-aſſurers. 276
This ſpecies of contract is countenanced in moſt parts of *Europe*. *ibid.*
The opinions of foreign writers upon re-aſſurance ſtated. *ibid.*
They were admitted in *England* till the 19 *Geo.* 2. *c.* 37. *ſ.* 4. which declares it to be unlawful to make re-aſſurance, unleſs the aſſurer ſhould be inſolvent, become a bankrupt, or die: in either of which caſes, ſuch aſſurer, executors, adminiſtrators, or aſſigns, might make re-aſſurance to the amount before by him aſſured, expreſſing in the policy that it is a re-aſſurance. 277
The reaſons for theſe exceptions as to bankrupts and deceaſed underwriters, ſtated. *Page* 277
Re-aſſurances on *foreign* ſhips are prohibited by this act, except in the three inſtances mentioned in the ſtatute. 279
In *France*, and other countries, it is allowed to the inſured to inſure the ſolvency of the underwriter. 280
Not allowed in *England*. *ibid.*
Diſtinction between a re-aſſurance and a double inſurance. *ibid.*
Where a policy void as a re-aſſurance, the premium is not recoverable. 375

Recapture. See *Capture.*

Regiſtration.

The law of *England* does not require that a policy ſhould be regiſtered. 29

Rendezvous.

Sailing from place of rendezvous is a departure with convoy. 34, 36

Repreſentation. See title *Fraud*, and titles *Warranty.—Convoy.*

Requiſites of a Policy.

The name of the perſon inſured. 15
The name of the ſhip and maſter. 19
Whether they are ſhips, goods, or merchandizes, on which the inſurance is made. 20
The name of the place at which the goods are laden, and to which they are bound. 22
The time when the riſk commences, and when it ends. *ibid.*
The various perils to which the underwriters are expoſed. 24
The conſideration or premium for the hazard run. 26
The time when the policy was executed. 27
That the policy be duly ſtamped. 28

Reſpondentia. See *Bottomry.*

Return of Premium.

The queſtion, whether the premium is to be returned by the underwriter, where the inſured has been guilty of fraud, conſidered. 215

The

The ordinances of foreign ſtates declare, for the moſt part, that it ſhall. *Page* 215
In *England* there has been no legiſlative regulation; and the courts of juſtice had not till lately adopted any general rule upon the ſubject. 216
In two or three inſtances where the underwriters have been relieved in Chancery, from the payment of the ſums inſured on account of fraud, the decree has directed the premium to be returned. *ibid.*
The queſtion came on to be conſidered in the King's Bench; but the trial being had under a decree of the court of Chancery, and the inſurer having there made an offer of returning the premium, the court of King's Bench conſidered this offer in the ſame light as if he had paid the money into court; and therefore the queſtion remained undecided. 217
But in a caſe where the fraud was of a very groſs and heinous nature, Lord *Mansfield* told the jury, that the premium ſhould not be reſtored to the inſured. 218
In all caſes of *actual* fraud on the part of the aſſured or his agent, the underwriter may retain the premium. *ibid.*
It is clear, that if the underwriter has been guilty of fraud, an action *lies* againſt him, at the ſuit of the inſured, to recover the premium. *ibid.*
In caſes of deviation the premium is not to be returned. 317
Where property has been inſured to a larger amount than the real value, the inſurer ſhall return the overplus premium. 367
If goods are inſured to come in certain ſhips from abroad, but are not in fact ſhipped, the premium ſhall be returned. *ibid.*
If the ſhip be arrived before the policy is made, the inſurer being apprized of it, and the inſured being ignorant of it, he is entitled to have his premium reſtored. *ibid.*
But if both parties are ignorant of the arrival, and the policy be *loſt or not loſt*, it ſhould ſeem the underwriter ought to retain it. *ibid.*
Clauſes are frequently inſerted by the parties, that upon the happening of a certain event, there ſhall be a return of premium. *Page* 367
If the ſhip or property inſured was never brought within the terms of the contract, ſo that the inſurer never ran any riſk, the premium muſt be returned. *ibid.*
A clauſe was inſerted that 8 *l. per cent.* of the premium ſhould be returned, if the ſhip ſailed from any of the *Weſt India* Iſlands with convoy for the voyage *and arrives*. The court held, that the arrival of the ſhip, whether with, or without convoy, entitled the party to a return of the premium ſtipulated. 369
So alſo, though there has been a capture and re-capture during the voyage inſured. 371
Whether the cauſe of the riſk not being run is attributable to the *fault*, *will*, or *pleaſure* of the inſured, the premium is to be returned. 371, 377
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2 As to an illegal inſurance? 377
Where the riſk has *once* commenced, there ſhall be no apportionment or return of premium afterwards. *ibid.*
Therefore no return in deviations. *ibid.* note *a*)
But if there are two diſtinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the uſage of trade, and only one of the two voyages was made, the premium ſhall be returned on the other, though both are contained in one policy. *ibid.*
Thus held in an inſurance "at and "from *London* to *Halifax*, warranted "to depart with convoy from *Portſ-* "*mouth*," when the ſhip arrived at *Portſmouth*, the convoy was gone. The premium for the voyage from *Portſmouth* to *Halifax* was returned. 378
A ſhip was inſured for twelve months, at 9 *l. per cent.* warranted free from *American* captures. The ſhip was taken within two months by the *Americans*;

Americans; but there ſhall be no return of premium, becauſe the contract was entire; the premium was a groſs ſum ſtipulated and paid for twelve months. *Page* 380
So alſo it was held where a ſhip, inſured for twelve months, was taken at the end of two; though the whole premium of 18*l.* was acknowledged to be received *at the rate of* 15*s. per month*; for that is only a mode of computing the groſs ſum. 384
When the contract is entire, whether it be for a ſpecified time, or for a voyage, there ſhall be no apportionment or return, if the riſk has once commenced. 386
Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the riſk is to end, nor any uſage eſtabliſhed upon ſuch voyage; though there be ſeveral diſtinct ports, at which the ſhip is to ſtop, yet the voyage is one, and no part of the premium ſhall be recoverable. *ibid.*
It was ſo held where a ſhip was inſured "*at* and *from Jamaica*, warranted to "ſail on or before the firſt of *Auguſt*, "to return eight *per cent.* if ſhe "ſailed with convoy." The ſhip did not ſail till *September*. There ſhall be no return upon the warranty of the time of ſailing: for the court cannot make a diſtinction between the riſk *at* and the riſk *from*. 389
It is otherwiſe, if the jury find an expreſs uſage upon the ſubject of return of premium. 390
Indeed, it ſeems that there never has been an apportionment, unleſs there be ſomething like an uſage found to direct the judgment of the court. 392
If a perſon, whoſe life is inſured, ſhould commit ſuicide, or be publicly executed the next day after the riſk commences, there can be no return of premium. 440
There can be no return of premium in inſurances againſt fire. 456

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Suppoſed to have been unacquainted with the contract of inſurance. Introd. vii
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Riſk.

The riſk on the ſhip in general commences from her beginning to load, and continues till ſhe has moored twenty-four hours in ſafety. On goods from the loading till they are ſafely landed, which includes the carriage to the ſhore in the ſhip's boats, but not in thoſe of the owner of the goods. 23, 24, 31
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Royal Exchange Aſſurance Company.

Erected by royal charter, authoriſed by ſtat. 6 *Geo.* 1. ch. 18. 7
This and the *London* Aſſurance Company, are the only *ſocieties* which may make inſurances. 7, 8
The privileges of the *South Sea*, and *Eaſt India* Companies preſerved. 8
This company rejects the words "*or the* "*ſhip be ſtranded*," in the memorandum at the foot of the policy. 21
This ſociety, when ſued *in an action of debt*, may plead generally *that they owe nothing*, or in *covenant that they have not broke it*, and in both caſes may give the ſpecial matter in evidence. 397
This company obtained his majeſty's charter to enable them to make inſurances on lives. 430

Sailing (Warranty of).

IF a man warrant to ſail on a particular day, and do not, the inſurer is diſcharged. *Page* 325

This rule holds, though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force. *ibid.*

Thus, where a ſhip was inſured "at "and from *Jamaica*," warranted to ſail on or before the 26th of *July*, it appeared that the ſhip was ready and would have ſailed on the 25th, *if ſhe had not been reſtrained by the order and command of Sir Baſil Keith*, governor of *Jamaica*, and *detained beyond the day*. The inſurer was diſcharged. *ibid.*

This rule is adopted by foreign writers. 326

If the warranty be to ſail *after* a ſpecific day, and the ſhip ſail before, the policy is equally avoided as in the former caſe. *ibid.*

Upon a warranty to ſail on or before a particular day, if the ſhip ſail before the day from her port of loading *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the iſland merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo beyond the day. 327

But if her cargo was not complete it would not be a commencement of the voyage. *ibid.*

The ſame doctrines prevail, even though a condition be inſerted in one of the ſhip's clearances, *that ſhe ſhould paſs by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. 332

Thus alſo where an embargo was actually publiſhed before the ſhip ſailed, and the captain, immediately after croſſing the bar, returned to make a proteſt, and knowingly ſent his ſhip into the embargo; yet, as he ſwore, that he believed the embargo was to be taken off, the underwriter was held liable. 337

What ſhall be a ſailing from the port of *London*. 2. 338

Sailing Inſtructions.

Eſſential to convoy. *Page* 342, 342 *a*

Sailors.

Inſurances on the wages of ſailors are forbidden. 12

Slaves, or any commodity to be received in lieu of wages by a ſailor, cannot be inſured. *Ibid.*

But the captain may inſure goods which he has on board, or his ſhare in the ſhip if he be a part owner. 13

The wearing apparel of the ſailors is excepted from the allowance of ſalvage. 140

Salt.

The word *Salt* uſed in the memorandum of a policy of inſurance has been held not to include *Salt-petre*. 113

Salvage.

Salvage is an allowance made for ſaving a ſhip or goods, or both, from the dangers of the ſeas, fire, pirates or enemies; it is alſo uſed ſometimes to ſignify the thing itſelf which is ſaved. But the former is the ſenſe in which it is here uſed. 131

In an action of trover, it has been held that the defendants might retain the goods till payment of ſalvage, as well as a taylor the cloaths which he has made. *ibid.*

When a ſhip has been wrecked, the law of *England* by various ſtatutes declares, that *reaſonable* ſalvage only ſhall be allowed to thoſe who ſave the ſhip or any of the goods; and what ſhall be a reaſonable allowance muſt be aſcertained by three juſtices of the peace. 132 to 138

If any prize taken from the enemy ſhall appear to have belonged to any of his majeſty's ſubjects, it ſhall be reſtored to the former owner, upon his paying, in lieu of ſalvage, one eighth of the value if retaken by one of his majeſty's ſhips, but if retaken by a privateer, one ſixth. 72, 139

Wearing apparel of the maſter and ſeamen are always excepted from the allowance of ſalvage. 140

The valuation of a ſhip and cargo, in order to aſcertain the rate of ſalvage, may be determined by the policies of inſurance made on them reſpectively; if there be no reaſon to ſuſpect they are undervalued. If there be no policy, the real value muſt be proved by invoices, &c. *Page* 140

Underwriters, by their policy, expreſsly undertake to bear all expences of ſalvage. *ibid.*

In order to entitle the inſured to recover expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy. 141

Thus in a declaration on a policy on goods, it ſtated, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. Lord *Hardwick* held that under this declaration, the plaintiffs might give in evidence the expences of ſalvage. 141

But if the inſurer pay to the inſured ſuch expences, and, from particular circumſtances, the loſs be repaired by unexpected means, the inſurer ſhall ſtand in the place of the inſured, and receive the ſum thus paid to atone for the loſs. *ibid.* 164

Where the ſalvage is high, the other expences are great, and the object of the voyage is defeated, the inſured is allowed to abandon to the inſurer, and call upon him to contribute for a total loſs. 142

See *Abandonment.*

There is neither average nor *ſalvage* upon a bottomry bond in England. 422

Aliter, in France and Denmark. 423

Sea, vide *Perils of the Sea.*

Sea-worthineſs.

Every ſhip inſured muſt, at the commencement of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen, and if ſhe have a latent defect wholly unknown to the parties, that will vacate the contract, and the inſurers are diſcharged. 220

This ariſes from a tacit and implied warranty, that the ſhip ſhall be in a condition to perform the voyage. *P.* 221

But the inſured ought to know whether ſhe was ſeaworthy or not at the time ſhe ſet out upon her voyage; yet if it can be ſhewn that the decay to which the loſs is attributable, did not commence till a period ſubſequent to the inſurance, the underwriter will be liable, if ſhe ſhould be loſt a few days after her departure. *ibid.*

If a ſhip become leaky immediately after ſailing, and founders without any viſible cauſe, the jury may preſume ſhe was not ſeaworthy. 221 note*

The whole doctrine of ſeaworthineſs to be collected from the caſe of the *Mills* Frigate, which is fully ſtated from page 221 to 228, and ſee alſo 228 *a*, 228 *b*, and 229

The doctrine of ſeaworthineſs, as eſtabliſhed by the law of *England*, is conſonant to the laws of all the commercial and maritime ſtates in *Europe*. 229

Where the ſhip is not ſeaworthy, the policy is void, as well where the inſurance is upon the goods, as when it is upon the ſhip itſelf. 231

But inſufficiency in a former voyage will not vacate the contract. 229 *a*

The ſhip muſt be properly equipped, have a ſufficient crew, a captain and pilot of competent ſkill. 229 *b*

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Slaves.

Inſurances on cargoes of ſlaves regulated. 25 *a*

Ship.

The name of the ſhip muſt be inſerted in the policy. 19

But if neceſſity require it, the ſhip may be changed in the courſe of the voyage, and the inſurer *on the cargo* continues liable. 20, 290

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An insurance upon a smuggling voyage, prohibited by the revenue laws of this country, is void; *aliter*, if merely against the revenue laws of a foreign state. 236

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Every policy of insurance, must be duly stamped. 28
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Stowage.

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Stranding.

What ſhall be deemed a ſtranding within the memorandum, by which no average loſs on fruit, &c. is recoverable, unleſs the ſhip be ſtranded. 20, 21, 101

If the ſhip has been ſtranded, average loſſes may be recovered though not a conſequence of the ſtranding. 115 *b*, *c*, *d*.

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Survey. See *Evidence*, *Admiralty*.

Thieves.

Q. WHETHER the inſurers are anſwerable for thefts committed by the people on board the ſhip? 25

They are expreſsly liable for thefts committed by external thieves. *ibid.*

Time.

No policy for time muſt be for a longer term than 12 months. 28 *b*

In inſurances upon time, the court, in their conſtruction of them, has always attended to the meaning of the parties, and a liberal expoſition of the words of the contract. *Page* 58

A policy was made on a letter of marque, at and from *Liverpool* to *Antigua*, *with liberty to cruize ſix weeks*; the court held that this meant ſix *ſucceſſive* weeks, and not a deſultory cruiſing for ſix weeks at any time. 58, 59

Total Loſs.

A total loſs in inſurances does not always mean that the property inſured is irrecoverably loſt or gone; but that, by ſome of the perils mentioned in the policy, it is in ſuch a condition as to be of little uſe or value to the inſured, and to juſtify him in abandoning his right to the inſurer, and calling upon him to pay the whole of his inſurance. 98, 143

In a total loſs, properly ſo called, the prime coſt of the property inſured, or the value in the policy, muſt be paid by the underwriter. 98

Where the policy is a valued one, it is only neceſſary to prove that the goods were on board at the time of the loſs. 103

Where it is an open policy, the value muſt alſo be proved. *ibid.*

The inſured may call upon the underwriter for a total loſs, if the voyage be abſolutely loſt, or not worth purſuing; if the ſalvage amount to half the value; or if further expence be neceſſary, and the underwriter will not engage at all events to bear that expence. 145, 152, 159

A ſhip was taken by a *Spaniſh* ſhip, retaken by an *Engliſh* privateer and carried into *Boſton*, where, as no perſon appeared to give ſecurity for the ſalvage, ſhe was ſold; the recaptors had their moiety, and the overplus remained with the officers of the court of Admiralty. The owners were entitled to abandon and to recover for a total loſs. 146

A ſhip was taken by the *French*, remained with them eight days, and was retaken; the maſter, mates, and ſailors, except a landman and an apprentice, had been taken out and carried to *France*. Before the capture,

ture, the ſhip had been ſeparated from her convoy, and was ſo far diſabled by ſtorm, as to be incapable of proceeding on her deſtined voyage, without going into port to refit. Part of the cargo was thrown overboard in the ſtorm, and the reſt ſpoiled while the ſhip lay at *Milford Haven*. In actions upon two policies, one on the ſhip, and the other on the cargo, it was held that this was a total loſs, ſo as to entitle the owner to abandon. *Page* 148

A ſhip, bound from *Montſerrat* to *London*, was captured, and the captain, crew, rigging, and part of the cargo, which was ſugar, were taken away. She was retaken and carried into *New York*, where the captain alſo arrived. Upon taking poſſeſſion, he found that part of the cargo which had been left was waſhed overboard; that 57 hogſheads of what remained were damaged, and that the ſhip was in ſuch a ſtate that ſhe could not be repaired, without unloading her entirely. The owners had no ſtorehouſes at *New York*; nor were any ſailors to be had. The ſalvage came to forty hogſheads of ſugar; and if the ſhip had been repaired, it would have exceeded the freight by 100*l*. There was an embargo laid on all ſhips till *December*, and the ſhip ſhould have arrived in *London* the *July* preceding. The captain, upon the advice of his friends, ſold the cargo, and was paid for it; he agreed alſo to ſell the ſhip; but the perſon who contracted for it ran away, upon which the captain left her in a creek, and returned to *England*. This was a total loſs, and the owners had a right to abandon. 152

The right to abandon muſt depend on the nature of the caſe at the time of the action brought, or at the time of the offer to abandon; and therefore if at the time advice is received of the loſs, it appear that the peril is over and the thing is in ſafety, the inſured has no right to abandon. 146, 158

Thus, in a caſe where there was a capture and recapture, and it was ſtated that, at the time of the offer to abandon, the ſhip was ſafe in port, and had ſuſtained no damage, the court held that the inſured had no right to abandon. *Page* 157

But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund; but the inſurer ſhall ſtand in his place for the benefit of ſalvage. 164

A ſhip was inſured from *Wyburg* to *Lynn*, at which place ſhe arrived: the jury found that the ſhip was not worth repairing; but the damage ſuſtained in the voyage inſured did not exceed 48*l. per cent.* By the court, the jury have precluded us from ſaying that this is a total loſs; and where neither the thing inſured nor the voyage is loſt, the inſured cannot abandon. 164

A ſhip was inſured for ſix months in port or at ſea; ſhe was in government ſervice, bound from *Cork* to *Quebec*. She arrived at *Quebec*, but the ſeaſon being too far advanced, before ſhe was ready to return, ſhe was removed into the haſon; but on the 19th of *November* ſhe was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ſhip could not be examined till *April* following, after the expiration of the policy. She was then found to be bulged and much injured, but not thought irreparably ſo. In the progreſs of the repair difficulties aroſe for want of materials, and the captain, after conſultation, ſold her. This was held to be but a partial loſs in *November*. 166

A veſſel inſured for ſix months is captured and ſold by the captors, and purchaſed by the captain for the original owners, this is only a partial loſs: though otherwiſe if the aſſured had abandoned, when carried into port in the enemy's poſſeſſion. 167

But in an inſurance on ſhip, cargo, and freight, at and from *Tortola* to *London*, warranted free of particular average, it appeared that on the 1ſt of *Auguſt* the whole fleet got under way, but not being able to get clear

of the iſlands, they anchored, and next day got clear. About 10 o'clock on the 2d of *Auguſt*, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain, and make water ſo faſt, that the crew were obliged to work both pumps: on the 3d the captain made a ſignal of diſtreſs, and returned to *Tortola*. A ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo; that ſhe could not be repaired in any of the *Engliſh Weſt India Iſlands*; many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral of the caſks broke and in bad order. This was held to be a total loſs, the voyage being entirely defeated. *Page* 168

There muſt be a total loſs at ſome period or other of the voyage, to entitle the aſſured to abandon. 166

Trover.

Trover will lie for a policy, at the ſuit of the inſured, if it be wrongfully withheld from him. 4

In trover, a defendant may in evidence juſtify the retainer of the goods till payment of ſalvage. 131

Underwriter. See *Inſurer.*

Uſage.

IN the conſtruction of policies no rule has been more frequently followed than *the uſage of trade* with reſpect to the voyage inſured. 30

As to uſage upon a warranty of convoy. 34

Upon an inſurance on goods to *Labradore*, and till they were ſafely landed, the inſurers were held liable, on account of the uſage, although the loſs did not happen till a month after the ſhip's arrival, the crew having been all that time employed in fiſhing, and never having unloaded the goods but at leiſure times. 44

As to the Uſage in Eaſt India Voyages, ſee title *Eaſt India Voyages.*

Valuation.

IN a total loſs, the underwriter muſt pay the amount of the prime coſt of the property inſured, or the value mentioned in the policy. *Page* 98

So if part of the cargo, capable of a diſtinct valuation, be totally loſt, the inſurer muſt pay the whole prime coſt of the part ſo loſt. *ibid.*

In caſe of a partial loſs, when the policy is valued, the rule for eſtimating the damage, is to aſcertain whether the goods be a third or fourth worſe when they arrive at the port of delivery; and then the underwriter muſt pay a third or fourth of the value in the policy, without regard to the riſe or fall of the market. 103, 107

When the valuation is not ſtated in the policy, the invoice of the coſt, with addition of all charges, and the premium of inſurance, is the foundation upon which the loſs ſhall be computed. 104

Valued Policy.

In *valued* policies, the value of the property inſured is inſerted at the time of making the contract, and upon a trial, it is not neceſſary to go into the proof of the value, becauſe it is admitted by the policy. 1, 103

It is in ſuch a caſe only neceſſary to prove that the property was on board. *ibid.*

Where the loſs is partial, the value in the policy can be no guide to aſcertain the damage; and it then muſt become a ſubject of proof, as in the caſe of an open policy. *ibid.*

A valued policy is not a wager policy. 108, 266

In a valued policy, it is only neceſſary to prove ſome intereſt to take it out of the ſtatute 19 *Geo.* 2. *c.* 37. 109

If uſed merely as a cover to a wager, ſuch an evaſion would not be allowed to defeat the ſtatute. 109, 266

After a judgment by default upon a *valued* policy, the plaintiff's title to recover is confeſſed, and the amount of the damage is fixed in the policy. 118, 266

Venice.

Origin and progreſs of that republic. Introd. xxiv.

Void Policies.

The name of the perſon actually intereſted muſt be inſerted in the policy, or the name of the agent effecting it, *as agent*; otherwiſe the policy is void. *Page* 16

When the principal reſides abroad, the agent ſo effecting the policy muſt live in *England*. *Qu.* 16, 17.

But now it is ſufficient to inſert the name of the perſon actually intereſted, or that of the conſignor or conſignee of the goods, or the names of thoſe receiving the orders to inſure, or who ſhall give directions to effect the inſurance. 18, 19

Policies are rendered void *ab initio*, by the leaſt ſhadow of fraud or undue concealment. 174

Caſes of fraud with reſpect to policies, are liable to a three-fold diviſion. 1ſt, The *allegatio falſi*. 2d, The *ſuppreſſio veri*; 3d, Miſrepreſentation. The latter, though it happen by miſtake, if in a material part, will render the policy void as much as actual fraud. 175

See title *Fraud.*

Every ſhip inſured muſt, at the commencement of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen; and if ſhe have a latent defect, wholly unknown to the parties, that will vacate the contract, and the inſurers are diſcharged. 220.

See title *Sea-worthineſs.*

Whenever an inſurance is made on a voyage expreſsly prohibited by the common, ſtatute, or maritime law of this country, the policy is void. 232

See title *Illegal voyages.*

All inſurances upon commodities, the importation or exportation of which is prohibited by law, are void. 244

See title *Prohibited Goods.*

By ſtatute 19 *Geo.* 2. *c.* 37. it was declared, that inſurances made on ſhips or goods, *intereſt or no intereſt*, or *without further proof of intereſt than the policy*, or *by way of gaming or wagering*, or without benefit of ſalvage to the inſurer, ſhould be null and void. *Page* 262

See title *Wager Policies.*

It is, by the ſame ſtatute, declared unlawful to make re-aſſurance, unleſs the firſt aſſurer ſhould be inſolvent, become a bankrupt, or die: in either of which caſes ſuch aſſurer, his executors, adminiſtrators, and aſſigns, might make re-aſſurance to the amount before by him aſſured, expreſſing in the policy that it is a re-aſſurance. 277

See title *Re-aſſurance.*

Wager Policies.

See *Intereſt Inſurable.*

IN wager policies, the performance of the voyage in a reaſonable time and manner, and not the bare exiſtence of the ſhip or cargo, is the object of the inſurance. 259

Theſe policies being contradictory to the real nature of a policy, which is a contract of indemnity, were originally bad. *ibid.*

They were introduced into *England* ſince the Revolution. 260

But the courts of juſtice looked on them with a jealous eye; and the courts of equity ſtill conſidered them as void. *ibid.*

Thus a policy was decreed to be delivered up where the inſured had no intereſt in the ſhip or cargo, except as a lender on bottomry, for which he had a bond. *ibid.*

Where a man had inſured goods by agreement valued at 600 *l.* *and not to be obliged to prove any intereſt*, the Chancellor ordered the defendant to diſcover what goods he had on board. 261

The great diſtinction between *intereſt*, and wager-policies, was, that in the former,

former, the insured recovered for the loss actually sustained, whether it was a total or partial loss; in the latter he could never recover but for a total loss. *Page* 261

By the statute of 19 *Geo.* 2. *c.* 37. it was enacted, that insurances made on ships or goods, *interest or no interest*, or *without further proof of interest than the policy*, or *by way of gaming or wagering*, or *without benefit of salvage to the insurer*, should be null and void. 263

There is an exception for insurances on private ships of war, fitted out solely to cruise against his majesty's enemies. *ibid.*

It was also provided, that any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal*, may be insured in such way or manner as if this act had not been made. *ibid.*

This statute has been frequently held not to extend to insurances of foreign property, on foreign ships. 265

A count in a declaration averring that the plaintiffs, as commissioners appointed by his majesty, under an act of parliament, for the disposal of *Dutch* ships and effects, made the insurance; and *that the said ships, or any of them, were not belonging to his majesty, or any of his subjects*, was holden to be good, within the statute. 266

A *valued* policy is not a wager policy; for he must prove some interest, although he need not prove the value of his interest. *ibid.*

If a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void. *ibid.*

An insurance on the profits expected to arise from a cargo of molosses, belonging to the plaintiffs was held to be good; although there was a clause declaring, "that in case of loss, the profits should be valued at 1000 *l.* without any other voucher than the policy." 267

An insurance being made on any of the packet boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as his majesty should direct, for one year, upon any kind of goods and merchandizes whatsoever; it was agreed that the goods and merchandizes should be valued at the sum insured, without further proof of interest, than the policy. The court held that this was a policy of a mixed nature, and that the insured might recover. *Page* 268

Upon a joint capture by the army and navy, the officers and crew of the ships, before condemnation, have an insurable interest, by virtue of the prize act, which usually passes at the commencement of a war. 269, 270

So also the commissioners for the care and disposal of *Dutch* effects, have an insurable interest in *Dutch* ships and effects seized at sea for the purpose of bringing into the ports of this kingdom, and a count averring that *they were interested as such commissioners* was holden to be good. 270 *n.*

All insurances, made by persons having no interest in the event, about which they insure, or without reference to any property on board, are merely wagers, and are void. 270

Thus where the defendant, in consideration of 20 *l.* paid by the plaintiff, undertook that the ship should save her passage to *China* that season, or that he would pay 1300 *l.* within one month after the arrival of the said ship in the river *Thames*; the contract was held to be void, although the plaintiff had some goods on board. *ibid.*

The plaintiffs had lent 26,000 *l.* on bond, to a captain of an East-Indiaman, and insured the ship and cargo to that amount, and *in case of loss no other proof of interest to be required than the exhibition of the said bond.* The contract was held to be void. 272

The third section of the statute relative to insurances, from any ports or places in *Europe* or *America*, in the possession of *Spain* or *Portugal*, is founded on the regulations of those courts; but it is loosely worded. 274

Wages.

No maſter or owner of any merchant ſhip ſhall pay to any ſeaman beyond the ſeas, any money on account of wages, exceeding a half of the wages due at the time of ſuch payment, till the ſhip ſhall return to *Great Britain* or *Ireland*. *Page* 12

Inſurances on the *wages* of ſeamen are forbidden. *ibid.*

Slaves, or any commodity to be received by a ſailor in lieu of wages, cannot be inſured. *ibid.*

But the captain may inſure goods, which he has on board, or his ſhare in the ſhip, if he be a part owner. 13

Extraordinary wages paid to ſeamen during a detention to repair, or a detention by an embargo, cannot be recovered againſt the inſurers *on the ſhip or cargo*. 52, 54

Q. Whether they are expences that will fall under the denomination of a general average. 125, 126

Sailors wages are not liable to contribution in a caſe of general average. 127

Warranties implied. See title *Seaworthineſs*.

Warranty.

A warranty in a policy of inſurance, is a condition or a contingency, that a certain thing ſhall be done, or happen; and unleſs that is performed, there is no valid contract. 318

It is immaterial for what end the warranty is inſerted in the contract; but being inſerted it becomes a binding condition upon the inſured, and he muſt ſhew a *literal* compliance with it. *ibid.*

It is no matter whether the loſs happen in conſequence of the breach of warranty or not; for the very meaning of inſerting a warranty is to preclude all enquiry about its materiality. 319

But as warranties are *ſtrictly* conſtrued in order to diſcharge the underwriter, ſo alſo they ſhall be ſtrictly conſtrued in favour of the inſured. 349

It is alſo immaterial to what cauſe the non-compliance is to be attributed; for although it might be owing to wiſe and prudential reaſons, the policy is avoided. *Page* 320

In this ſtrict and literal compliance with the terms of a warranty conſiſts the difference between a warranty and repreſentation. See title *Fraud*. *ibid.*

In order to make *written* inſtructions binding as a warranty, they muſt appear on the face of, and make a part of the policy. 321

If a policy refer to printed propoſals, they are to be conſidered as part of the policy. 322 note (*a*)
449 note (*a*)

Even though a written paper be *wrapt up in the policy*, and ſhewn to the underwriters at the time of ſubſcribing; or even *though it be ſuppoſed to the policy*, it is not a warranty but a repreſentation 321

Thus when evidence was offered to prove that a paper enclоſed was always deemed a part of the policy, Lord *Mansfield* refuſed to hear it. *ibid.*

A warranty written *in the margin* of the policy is conſidered to be equally binding, and liable to the ſame ſtrict conſtruction, as if written on the body of the policy. 322, 323

Words written tranſverſely on the policy were held to be a warranty. 322

If a man warrant to ſail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer anſwerable. 325

This rule holds though the ſhip be delayed, for the beſt and wiſeſt reaſons, or even though ſhe be detained by legal force. *ibid.*

This rule is adopted by foreign writers. 326

If the warranty be to ſail *after* a ſpecific day, and the ſhip ſail before, the policy is equally avoided as in the former caſe. *ibid.*

Upon a warranty to ſail on or before a particular day, if the ſhip ſail before the day from her port of loading, *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the iſland, merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there

there by an embargo, beyond the day. *Page* 327
But if her cargo was not complete, it would not be a commencement of the voyage. *ibid.*
When a ſhip leaves her port of loading, having a full and complete cargo on board, and having no other view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port, 331
The ſame doctrine was advanced, even though it was a condition inſerted in one of the ſhip's clearances, that *ſhe ſhould paſs by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. 332
Thus alſo an embargo was actually publiſhed, before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt, and knowingly ſent his ſhip into the embargo, yet as he ſwore, that he believed the embargo would be immediately taken off, the underwriter was held liable. 337
If the inſured warrant that the veſſel ſhall depart with convoy and it do not; the policy is defeated, and the underwriter is not reſponſible. 338
A convoy means a naval force, under the command of that perſon whom government may happen to appoint. 338, 341
Regulated by government and uſage. 349 *a*

See title *Convoy*.

Therefore where a ſhip put herſelf under the direction of a man of war till ſhe ſhould join the convoy, which had left the uſual place of rendezvous before ſhe arrived there; it was held not to be a departure with convoy, although ſhe, in fact, joined, and was loſt in a ſtorm. 339
Aliter, if ſuch ſhip was part of the convoy. 342
Q. Whether ſailing orders from the commander in chief to the particular ſhips are neceſſary to conſtitute a convoy. 341, 342
A convoy appointed by the Admiral, commanding in chief upon a ſtation abroad, is a convoy appointed by government. *Page* 343
A ſailing with convoy from the uſual place of rendezvous, as *Spithead* or the *Downs* for the port of *London*, is a *departure* with convoy, within the meaning of ſuch a warranty. 343, 343, 344
Although the words uſed generally are "to depart with convoy," or "to ſail with convoy," yet it extends to ſail with convoy throughout the voyage. 345
But an unforeſeen ſeparation from convoy is an accident to which the underwriter is liable. 347
So held where a ſhip was ſeparated from her convoy by ſtorm, prevented from rejoining it, and was loſt. 348
Even where the ſhip has, by tempeſtuous weather, been prevented from joining the convoy, at leaſt ſo as to receive the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy. *ibid.*
Otherwiſe, if the not joining be owing to the negligence and delay of the captain. 349
As where repeated ſignals for ſailing had been made the night before, and continued next day from 7 till 12; notwithſtanding which the ſhip inſured did not ſail till two hours after. *ibid.*
If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. 350
In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral; it was expreſsly found by the jury that they were not neutral. The court therefore, though the loſs happened by ſtorms, and not by capture, declared that the contract was void. *ibid.*
If the ſhip and property are neutral at the time when the riſk commences, this is a ſufficient compliance with a warranty of neutrality. 351, 353
The inſurer takes upon himſelf the riſk of war and peace. 352
If the property be neutral at the time of ſailing, and a war break out the next day, the inſurer is liable. 353

As

As to the effect of the ſentence of a foreign court of Admiralty, upon the queſtion of neutrality, ſee *Admiralty*.
Of warranty in a life inſurance, ſee title *Lives*.

Wearing Apparel.

Do not contribute to a general average. *Page* 127

Wiſbuy, Laws of,

An account of them. Introd. xxix
They mention inſurances. Introd. xxxii

Witneſſes. See *Evidence*.

Wool. See *Prohibited goods*.

Wreck.

In caſes of wreck a *reaſonable* ſalvage ſhall be allowed to thoſe who ſave the ſhip or any of the goods, to be aſcertained by three juſtices of the peace. *Page* 132 to 138
Of felony, in caſes of wreck, vide title *Felony*.

Written Clauſe.

The *written clauſe* in a policy will controul the printed words. 5

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